91-1470

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1992, TERM

JOE E. FRYAR,

PETITIONER

VERSUS

EDWARD C. ABELL, JR., AND
CAREY WALTON, ET AL,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
VOLUME I

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QUESTIONS PRESENTED

This petition for writ of certiorari on behalf of defendant-relator **JOE E. FRYAR** (petitioner) presents the following legal questions arising from a civil action lately pending before the United States Court of Appeals for the Fifth Circuit (the Fifth Circuit):

(1) Whether the RICO statute, 18 U.S.C. § 1961, et seq., specifically 18 U.S.C. § 1961(5), is unconstitutionally vague as applied to petitioner's specific conduct;

(2) Whether the post-trial application of the "relatedness" and "continuity" elements of RICO's pattern requirement to petitioner's conduct constitutes an impermissible retroactive application of a substantive change in the law as interpreted by the Fifth Circuit, thereby denying to petitioner his right to due process under the Fifth

Amendment to the United States Constitution; and

(3) Whether the denial of the right to present evidence and argument to the jury on the issues of the relatedness and continuity aspects of the pattern requirement and the lack of a specific finding of the jury on those issues constitutes an impermissible infringement on petitioner's right to trial by jury under the Seventh Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Fifth Circuit whose judgment is sought to be reviewed were:

Joe E. Fryar, Petitioner
Alexandria, Louisiana

Wright, Lindsey & Jennings,
Respondent
Little Rock, Arkansas

Valley Forge Insurance Company,
Respondent
Chicago, Illinois

Edward C. Abell, Jr., Respondent and
class representative
Lafayette, Louisiana

Carey Walton, Respondent and
class representative
Opelousas, Louisiana

All bondholders of Westside Habilitation Center bonds, which are members of class of plaintiffs,
Respondents

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No. _____

In The

Supreme Court of the United States

October Term, 1992

JOE E. FRYAR,

Petitioner

versus

EDWARD C. ABELL, JR.,
and CAREY WALTON, et al,

Respondents

TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

OPINION BELOW

After a two-month trial, a jury returned a multi-million dollar verdict against petitioner Fryar and others based on respondents' claims of securities fraud, racketeering and pendent state law

claims.[1] The United States District Court for the Western District of Louisiana entered judgment upon the jury verdict, awarding respondents damages totalling approximately **FIFTEEN MILLION AND NO/100 ($15,000,000.00) DOLLARS.**[2] The United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part, and remanded the case for further proceedings consistent with its opinion. See **Abell v. Potomac Insurance Company**, 858 F.2d 1104 (5th Cir. 1988).[3] Petitioner then petitioned for certiorari. This court granted certiorari, vacated judgment and

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[1] See the jury's interrogatory verdict, which is found at Appendix pp. 48 through 63.

[2] See the district court's judgment, which is found at Appendix pp. 64 through 70.

[3] See copy of the Fifth Circuit's opinion, which is found at Appendix pp. 71 through 278.

remanded. See **Fryar v. Abell**, 492 U.S. 914, 109 S. Ct. 3236, 106 L. Ed. 2d 584 (1989).[4] The Court of Appeals remanded to the district court. See **Abell v. Potomac Insurance Company**, 884 F.2d 196 (5th Cir. 1989). The district court reinstated the jury's RICO verdict and reduced the award of attorneys' fees.[5] Petitioner appealed on various grounds, including: (1) that the provisions of RICO, in particular 18 U.S.C. § 1961(5), are unconstitutionally vague in violation of the procedural due process guarantees of the 5th Amendment to the U.S. Constitution; and (2) that the uncontested facts in this case do not

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[4] See copy of this court's opinion, which is found at Appendix p. 279.

[5] See copy of the district court's ruling, which is found at Appendix pp. 280 through 291, and its judgment, which is found at Appendix 292 through 295.

constitute proof of "a pattern of racketeering activity" in light of this court's holding in **H.J. Inc. v. Northwestern Bell Tel. Co.**, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). The Fifth Circuit affirmed. See **Abell v. Potomac Ins. Co. of Illinois**, 946 F.2d 1160 (5th Cir. 1991).[6] Petitioner moved for rehearing on the grounds that the decision of the Fifth Circuit (1) denies to petitioner his due process rights under the Fifth Amendment to the United States Constitution, and (2) denies to petitioner his right to trial by jury in violation of the Seventh Amendment to the United States

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[6] See copy of the Fifth Circuit's opinion, which is found at Appendix pp. 296 through 343.

Constitution. The Fifth Circuit denied rehearing on December 11, 1991.[7]

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[7] See copy of the Fifth Circuit's denial of rehearing, which is found at Appendix pp. 344 through 345.

STATEMENT OF JURISDICTIONAL GROUNDS

On November 13, 1991, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the United States District Court for the Western District of Louisiana in this matter. Rehearing was denied on December 11, 1991.

This Court has jurisdiction to review the judgment of the district court, as affirmed by the Fifth Circuit, by writ of certiorari under **28 U.S.C. § 1254(1)**, which effectuates its appellate jurisdiction granted by **U.S.C. Const. Art. III, Section 2, cls. 1 and 2.**

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statute involved is 18 U.S.C. § 1961(5), which provides:

> "As used in this chapter --
>
> * * *
>
> (5) 'pattern of racketeering activity' **requires at least two acts of racketeering activity**, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; . . . ." (Emphasis added).

The pertinent constitutional provisions involved are:

U.S.C. Const., Amendment 5,, which provides, in part:

> * * * nor be deprived of life, liberty, or

> property, without due process of law; * * *

U.S.C. Const., Amendment 7, which provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The day has finally come in which the constitutionality of the RICO statute is before this Honorable Court. The background facts are as follows:

On July 5, 1984, a class action was filed on behalf of the bondholders of Westside Habilitation Center, Inc. (Westside), a Louisiana nonprofit corporation with its principal place of business in Cheneyville, Louisiana. In bringing their action, respondents invoked **15 U.S.C. section 771** (Section 12 of the Securities Act of 1933), **15 U.S.C. section 78(j)(b)** (Section 10(b) of the Securities Exchange Act of 1934) and **17 C.F.R. section 240.10b-5 (1987)** (Rule 10b-5), **18 U.S.C. section 1961, et seq.** ("RICO"), **LSA-R.S. 51:701, et seq.** (the "Louisiana Blue Sky Law") and **LSA-C.C. Arts. 2315** and **2316**. Consequently, the district court had jurisdiction to hear

and decide respondents' claims by virtue of its federal question jurisdiction, and it had jurisdiction to hear and decide pendent state law claims by virtue of the doctrine of "ancillary jurisdiction".

This case had its origin in 1976, when a citizen of Alexandria, Louisiana, perceived a dire need for a facility to take care of the mentally retarded and emotionally disturbed citizens of Louisiana. This citizen approached petitioner Fryar, a duly licensed architect and Frank Lloyd Wright laureate, for help in constructing this facility. Petitioner Fryar's immediate response was that he had no interest in operating such a facility, but he would build it. Originally, petitioner Fryar was to build and own the facility, which would be leased to others who would operate it. However, shortly after this undertaking began, petitioner Fryar

abandoned the effort to construct the facility, when he was unable to secure financing at reasonable interest rates.

In August of 1978, Joseph D. Hancock, an underwriter and investment banker, proposed the creation of a nonprofit corporation to own and operate the facility, which would be funded by an offering of revenue bonds. Accordinly, on April 5, 1979, Westside was formally organized as a nonprofit corporation. As ultimately devised, Hancock's plan provided that Westside would be a "start up" facility meaning it had neither operating history nor initial source of working capital. Funds to retire its revenue bonds would be generated exclusively by Medicaid reimbursement at 100% of costs.

To qualify for such reimbursement, the facility had to first achieve 80% occupancy for a continuous period of 90

days. Because it had no threshold funds, Westside had to secure a person or entity who would assume the interim financial burden and venture risk of operating the facility until, if ever, it obtained the occupancy level entitling it to 100% reimbursement. The financial burden and risk of the interim operation of Westside was awesome. From the first day of operation, with or without occupancy, the facility had to be fully equipped and fully staffed. As such, the cost estimate to put the facility in such a "start up" posture was $175,086.00 per month, or approximately $5,000.00 a day.

Hancock had previously sought to induce petitioner Fryar into assuming the financial risk of an interim operation of the facility. Petitioner Fryar rejected this proposal, fearing that the possible profit did not justify his assumption of the risk of the venture. This did not

discourage Hancock who continued to fine-tune his ultimate plan. All this time, petitioner Fryar continually objected to Hancock's ever increasing onerous conditions, and, on July 9, 1981, in a letter to Hancock, petitioner agonized:

> "The only two items that I ever intended to agree to, were the 80% occupancy clause and, reluctantly, the $1,000,000 line of credit which could be secured by a Westside Bond, but, like a cancer, the conditions and costs to me are growing unchecked. I have no objection to life insurance and performance bond, but withholding $700,000 until the job is finished and requiring me to buy $2,000,000 in Westside bonds while everyone else collects their fees up front (which evidently I have to pay out of my pocket), is unreasonable and unfair. It would also be stupid of me to put everything that I own into one project.

* * *

> Joe, I am sick and embarrassed by this lingering sore. also, the longer it lingers, more additional onerous conditions are loaded on to me."

By this time, petitioner Fryar had already spent $324,647.00 "on the project" on promises of reimbursement by Westside, if it succeeded. In order to salvage his accrued loss, petitioner Fryar cast about for someone with whom to share his financial burden. Eventually, petitioner Fryar approached an acquaintance, Clayton Chambers, to determine if he was interested in assuming some of petitioner's obligations. In a letter of June 30, 1981, petitioner Fryar wrote to Chambers:

> "Dear Mr. Chambers:
>
> It was a real pleasure to visit with you and enjoy Bermuda hospitality.
>
> You had requested a written proposition on my Cheneyville, Louisiana

project as a possible investment for one of your clients. I am interested in selling it under the following conditions:

1. I will sell the property for $150,000.

2. I am to continue to serve as architect-developer for a fee of 10% of the cost of construction, furniture and fixtures.

3. You will buy $2,000,000 of Westside Bonds and pledge them to completion of the development by me.

4. You will pay for a $11,000,000 life insurance policy on me which will be pledged to the trustee for completion of the project.

5. You will furnish Westside with a $1,000,000 operating line of credit for the life of the Bonds, which is 30 years.

6. You will pay all expenses and receive any reimbursement for operting the facility for 90 days after it reaches and maintains 80% occupancy.

If your client is interested in this proposition please let me know and I will have my lawyer prepare the necessary documents.

Sincerely,

JOE E. FRYAR, AIA"

Chambers eventually agreed using one of his corporations All American Services Company (AA) as the primary obligor and verbalized his agreement in a handwritten letter of November 24, 1981, which read:

"Dear Joe:

I had expected to hear from you by this time in connection with the sale to All-American Services Company of the Cheneyville property, but no doubt you have this in hand.

A-A Services has been duly incorporated and hereby agrees:

1-We will buy the property for $150,000.

2-Acquire and pledge $2,000,000. of bonds to your development contract.

3-Pledge $1,000,000. of bonds to the line of credit.

4-Pay all expenses and receive all income initially.

I hope all is going well!

Sincerely

H. Clayton Chambers"

In accordance with his agreement with Chambers, petitioner Fryar sold the Cheneyville property to AA for $150,000.00. As a means of compensating AA for the assumption of petitioner Fryar's obligations, AA sold the Cheneyville property to Westside for $2,459,700.00, which transaction was a matter of public record. On receipt of this purchase price, AA purchased and pledged $2,000,000.00 of Westside Bonds, as required by the development agreement between petitioner Fryar and Westside. The remainder was retained by AA to

compensate it for the assumption of Fryar's additional obligations.

In due course, the Westside bond issue was closed. Thereafter, Bossier Bank, the indenture trustee for the offering, **imprudently invested $8,000,000 of the $13,500,000 in bond proceeds in unsecured deposits with the Penn Square Bank in Oklahoma City.** Penn Square failed shortly thereafter.

In August of 1982, because of the loss of Westside funds, construction halted and petitioner Fryar incurred costs. Construction subsequently resumed, when litigation against Bossier Bank resulted in a settlement returning the principal of the deposit but only part of the interest. However, because completion of the project was delayed, earlier referrals of patients to Westside were lost. Notwithstanding these adversities, under petitioner Fryar's

efforts the facility achieved the occupancy level needed to qualify for 100% Medicare reimbursement. At this point in time, petitioner Fryar experienced uncompensated out of pocket expenses of $780,000.00.

Because of these adversities, Westside defaulted on the bond payment scheduled to be paid on October 1, 1984. In 1985, Westside petitioned for reorganization. At that time, petitioner Fryar had an unrecovered cash loss of $474,300.00. Westside has subsequently emerged from reorganization and has rescheduled payment of the reissued bonds, which bear interest at reduced rates. Westside is obligated to cure all interest arrearages when, and if, it has sufficient revenues to do so. Since attaining 80% occupancy, Westside has never been less than 98% occupied and is on a firm financial footing.

Westside bondholders, as a class, filed the subject lawsuit against every person, and each of the underwriting concerns and law firms, connected with the creation of Westside.[8] Named as defendants were: (1) petitioner Fryar, as the architect and developer of Westside; (2) Rodney Kendrick, chairman of Westside's board of directors and its president; (3) Hancock, Joseph & Daniels, as an underwriter offering the Westside bonds for sale to the public; (4) Joseph D. Hancock, as a promoter of Westside and the president and chief operating principal of Hancock, Joseph & Daniels; (5) Swink & Company, Inc., as an underwriter offering the Westside bonds of sale to the public; (6) Wright, Lindsey & Jennings, as counsel for the

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[8] See excerpts of respondents' original complaint, which are found at Appendix pp. 346 through 354.

underwriters of the Westside bond offering; (7) William E. Skye, as counsel for Westside; (8) John W. Peck, as bond counsel in connection with the offering of Westside bonds for sale to the public; (9) Peck, Shaffer & Williams, as bond counsel in connection with the offering of Westside bonds for sale to the public; (10) ABC Insurance Company (Valley Forge Insurance Company), as the malpractice insurer of Wright, Lindsey & Jennings; (11) National Union Fire Insurance Company of Pittsburgh, Pennsylvania, as the malpractice insurer of William E. Skye; (12) Potomac Insurance Company of Illinois, as the malpractice insurer of John W. Peck and Peck, Shaffer & Williams; (13) CNA Insurance Company, as the malpractice insurer of Wright, Lindsey & Jennings; and, (14) All American Service Company, Ltd., as an associate of Fryar in the Westside

project. Respondents' claims against a number of these defendants were compromised prior to trial.

A two-month-long jury trial was held in late 1986 and early 1987. By way of special interrogatories, the jury returned a verdict in favor of plaintiffs on all claims. With regard to the claimed RICO violations, the jury answered the following questions in the affirmative with regard to petitioner:

> 8. Do you find by a preponderance of the evidence that any of the following parties [including petitioner] violated Section 1962(a) of the RICO Act?
>
> 9. Do you find by a preponderance of the evidence that any of the following parties [including petitioner] violated Section 1962(b) of the RICO Act?
>
> 10. Do you find by a preponderance of the evidence that any of the following parties [including petitioner]

> violated Section 1962(c) of the RICO Act, for conducting or participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity involving mail fraud, wire fraud, or violations of the federal securities laws?

On appeal, the Fifth Circuit upheld the jury's finding against petitioner on the RICO claim, but remanded for a redetermination of damages, interest and attorneys' fees. This Court granted certiorari, vacated the judgment and remanded for reconsideration in light of its discussion of the appropriate standard for establishing a pattern of racketeering activity under RICO in **H.J. Inc. v. Northwestern Bell Telephone Co., Inc.**, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). The Fifth Circuit remanded to the district court, which upheld the jury's verdict in light of **H.J.** and rejected petitioner's argument

that RICO is unconstitutionally vague. Petitioner took an appeal whereupon the Fifth Circuit affirmed and denied rehearing. Petitioner now petitions this Honorable Court for certiorari on three grounds: (1) that RICO's requirement that a plaintiff or prosecutor prove a "pattern of racketeering activity" is unconstitutionally vague as applied to petitioner's conduct; (2) that the post-trial application of the "relatedness" and "continuity" elements of RICO's pattern requirement to petitioner's conduct constitutes an impermissible retroactive application of a substantive change in the law as interpreted by the Fifth Circuit, thus denying to petitioner his due process rights under the Fifth Amendment to the United States Constitution; and (3) that factual findings of "relatedness" and "continuity" of the alleged predicate

acts may only be made by the jury; such findings of fact by the court effectively deprives petitioner of his right to trial by jury under the Seventh Amendment to the United States Constitution.

LAW AND ARGUMENT

I. The RICO statute, 18 U.S.C. § 1961, et seq., specifically 18 U.S.C. § 1961(5), is unconstitutionally vague as applied to petitioner's specific conduct.

Long ago, this Court established that a statute violates due process of law if it "either forbids or requires the doing of an act in terms so vague that men of ordinary intelligence must necessarily guess as to its meaning and differ as to its application." **Connally v. General Construction Co.**, 259 U.S. 385, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926).

> To sustain such a challenge, the complainant must prove that the enactment is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." **Coates v. City of Cincinnati**, 402 U.S. 611, 614, 91 S. Ct.

> 1686, 1688, 29 L. Ed. 2d 214 (1971). Such a provision simply has no core.

Smith v. Goguen, 415 U.S. 566, 578, 94 S. Ct. 1242, 1249, 39 L. Ed. 2d 605 (1974). That is precisely the problem with the RICO statute and its "pattern" requirement: there is no core. It is, rather, a black hole. Its boundaries are ill-defined. Conduct may be swept into its reach without adequate warning. The RICO statute does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." **Grayned v. City of Rockford**, 408 U.S. 104, 108-109, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222 (1972). Nor does it "provide explicit standards for those who apply [it]" so as to avoid "arbitrary and discriminatory applications." **Id.** Relatedness and continuity should not be

applied on an I'll-know-it-when-I-see-it basis; however, without explicit guidance generated from the sweat of the Supreme Court's brow, that is precisely the tack that has been taken by the Courts of Appeals; specifically, by the Fifth Circuit in the instant case.

In 1989, this Court wisely recognized the disparate interpretations and applications of the statute when it decided **H.J. Inc.**, supra. However, the recognition of the problem and the Court's elucidation of the statement from **Sedima, S.P.R.L. v. Imrex Co.**, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 347 (1985), "that while two acts are necessary, they may not be sufficient," did more to frame the issue than to eradicate the problem. The Court's "hints" and "snippets" did not provide a sufficient framework on which to build a "meaningful concept of 'pattern.'" See

H.J. Inc., Scalia, J., concurring, 109 S. Ct. at 2906.

In the case now before the Court, the courts below have said to petitioner, "Although we don't know what "pattern" means, and although the Supreme Court hasn't defined what "pattern" means, a jury of ordinary laypersons has found that your conduct formed a "pattern." This is the sine qua non of arbitrary application. In truth and in fact, the jury was not called upon to make a finding that any alleged predicate acts were related.[9] Nor was there a finding of "continuity;" keeping in mind that neither concept had been defined with the necessary accuracy to avoid a vagueness challenge. The jury instructions set forth the law as it existed in the Fifth

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[9] See the jury's special interrogatories, which are found at Appendix pp. 48 through 63.

Circuit under **R.A.G.S.**, infra, and contained no parameters within which to find that a series of acts was related, nor any requirement that the alleged racketeering activities were continuous.[10]

The parameters of "relatedness" and "continuity" have not been brought into focus, exacerbating, rather than relieving, the vagueness of the statute. If, at the time of **H.J. Inc.**, four Justices of this Honorable Court "[had] no idea what the concept of a "closed period of repeated conduct" [meant]," how could petitioner have possibly known some thirteen years previously that his conduct may have fallen within the reach of the RICO statute? Further, in rejecting the "multiple schemes

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[10] See excerpt of the instructions given to the jury, which is found at Appendix pp. 355 through 356.

requirement," the Court has brought about two effects: The once murky waters of RICO are now polluted; and would-be RICO violators have been encouraged to do their deeds expeditiously.

Your petitioner's conduct has been characterized as a "scheme to defraud." Actually, he undertook a tremendous financial burden in order to make a facility for the care of mentally retarded and emotionally disturbed citizens of Louisiana a reality. However, while staunchly maintaining the legality of his activities, were one to concede for the sake of argument that such activities were illegal, they were performed within the parameters of a single "scheme." Petitioner's conduct did not pose even the slightest "threat of continuity." Once the bonds were sold, the so-called "scheme" ended. Something more is required in order to

brand a person a "racketeer." By defining RICO in terms of a "pattern" of racketeering activity, Congress intended that there be something more than multiple predicate acts. By attempting to define "pattern" in terms of "relatedness" and "continuity," this Court has indicated that there be something more than multiple predicate acts. The time has come for this Court to define "relatedness" and "continuity" in such a way that a person of ordinary intelligence would know what is required of him in order to "steer between lawful and unlawful conduct." **Village of Hoffman Est. v. Flipside, Hoffman Est.**, 455 U.S. 489, 102 S. Ct. 1186, 1993, 71 L. Ed. 2d 352 (1982). As Justice Scalia lamented in his concurrence in **H.J. Inc**:

> But what that something more is, is beyond me. As I have suggested, it is also beyond the Court. Today's opinion has added

> nothing to improve our prior guidance, which has created a kaleidoscope of circuit positions, except to clarify that RICO may in addition be violated when there is a "threat of continuity." It seems to me this increases rather than removes the vagueness.

Id. 109 S. Ct. at 2908. In order for RICO to be upheld, it must possess the degree of certainty required for criminal laws. **H.J. Inc.**, Scalia, J., concurring, at 2909; citing **FCC v. American Broadcasting Co.**, 347 U.S. 284, 296, 74 S. Ct. 593, 600-601, 98 L. Ed. 699 (1954). It does not. Congress never intended to snare within the RICO net persons such as your petitioner. He asks this Court to take the long-awaited opportunity to rid society of the intolerable infringement on the fundamental due process rights of individuals charged with violating this

clearly unconstitutional, quasi-criminal statute.

II. The post-trial application of the "relatedness" and "continuity" elements of RICO's pattern requirement to petitioner's conduct constitutes an impermissible retroactive application of a substantive change in the law, thereby denying to petitioner his right to due process.

Should the Court forego the opportunity to declare RICO unconstitutionally vague, petitioner contends that the post-trial application of the "relatedness" and "continuity" elements of RICO's pattern requirement to petitioner's conduct constitutes an impermissible retroactive application of a substantive change in the law as interpreted by the Fifth Circuit, thereby denying to petitioner his right to due process under the Fifth Amendment to the United States Constitution. At the time of petitioner's trial in late 1986 and

early 1987, the law in the Fifth Circuit, as expressed in **R.A.G.S. Couture, Inc. v. Hyatt**, 774 F.2d 1350 (5th Cir. 1985), was that two (2) related acts of mail fraud constituted a "pattern of racketeering activity," without more. The civil RICO claims against petitioner were tested according to the rule of law established in **R.A.G.S.**, supra. On remand from this Court, the courts below utilized the **H.J. Inc.** decision, which expanded the "pattern of racketeering activity" rule of law far beyond the compass of **R.A.G.S.**, as a procrustean bed, upon which the perceived body of evidence developed during petitioner's trial was placed--its limbs stretched, rather than chopped off, to force that body of evidence to fit. This was not merely a procedural change, but worked to provide substance to the concept of "pattern"

that theretofore did not exist, and had not been applied, in the Fifth Circuit.

At all times material to the civil RICO claims against petitioner, your petitioner had no warning of the **H.J. Inc.** conduct which imposed civil and criminal liability upon him; he had no warning of what conduct to avoid or to defend against. He was not informed, for example, that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. . ." **H.J. Inc.**, 109 S. Ct. at 2902. Thus, he was not given the opportunity or informed of the possibility of tailoring his conduct so as to fall within the safe harbor of this defined "pattern of racketeering activity." Nor was petitioner informed that "though the number of related predicates involved may be small and they may occur close together in time, the

racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity." **H.J. Inc.**, 109 S. Ct. at 2902. Had he been on notice of the multi-factors involved in the **H.J. Inc.** definition of "pattern of racketeering activity," then during his trial he would have had the opportunity to present evidence to rebut any incriminatory evidence and particularly the conclusion that "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." Moreover, generally speaking, had petitioner been placed on notice of the conduct proscribed by **H.J. Inc.**, he could have avoided the prohibited conduct, and during trial, he could have presented evidence in defense of the claims asserted against him and thus could have

had the opportunity to exc ate himself completely from liability.

Petitioner's right to air warning" of the nature and character of the conduct proscribed "is fundamental to our concept of constitutional liberty. (citations omitted) As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment." **Marks v. United States**, 430 U.S. 188, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). See also **Bouie v. City of Columbia**, 378 U.S. 347, 84 S. Ct. 1697 (1964). Petitioner's rights under the Due Process Clause of the Fifth Amendment were denied to him both at the trial level, where he did not have the opportunity to defend against the multiple factors of **H.J. Inc.**, and at the appellate level, where the substantive elements of "relatedness" and

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"continuity" were retroactively applied to his conduct.

III. Petitioner was denied the right to present evidence and argument to the jury on the issues of "relatedness" and "continuity," constituting an infringement on his right to trial by jury.

No authority need be supplied for the tenet that the right to trial by an impartial jury is a fundamental concept of due process. Petitioner was denied the right to have a jury decide critical fact-specific issues involved in this case; whether the alleged predicate acts were "interrelated by distinguishing characteristics" and "not isolated events," H.J. Inc., 492 U.S. at 240, 109 S. Ct. at 2901; and whether there existed a "threat of repetition" of unlawful conduct. Id., 492 U.S. at 241, 109 S. Ct. at 2902. Factual findings made by a district judge or an appellate court are entitled to no weight; they are no

substitute for petitioner's right to a jury trial.

None of the multiple factors involved in the issue of relatedness of the alleged predicate acts was ever presented to the jury called upon to try petitioner's case. For example, none of the several factors enumerated by this Court to be considered in connection with a determination of relatedness of predicate acts, including "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events" was presented to the jury. H.J. Inc., 109 S. Ct. at 2901, analogizing to 18 U.S.C. § 3575(3).

Overriding and essential fact questions involved in the RICO claims against your petitioner, and relied upon

by the Fifth Circuit in affirming the verdict against petitioner, were never presented to the jury impaneled to try petitioner's case. The district court's reinstatement of the jury verdict, affirmed by the Fifth Circuit, constituted a usurpation of the prerogative of the jury in determining those facts. Moreover, as discussed hereinabove, petitioner did not have the opportunity to present evidence or argument to the jury to rebut the conclusion that "the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future." There certainly exists the possibility that a reasonable juror could have found no threat that petitioners' actions would project into the future; or that the alleged predicate acts were merely isolated acts. Thus, petitioner has been denied his right to trial by

jury in violation of the Seventh Amendment to the United States Constitution.

CONCLUSION

1. As applied to petitioner's specific conduct, and on its face, the RICO statute is constitutionally infirm due to its vagueness. This case involves nothing more than an alleged scheme on the part of petitioner and others to achieve a single, discrete objective; i.e., to allegedly defraud the respondents by issuing bonds and using the proceeds thereof "to finance the acquisition and construction of Westside at grossly inflated prices." This alleged scheme ended when the purpose was accomplished. It was an isolated occurrence without any evidence from which a threat of ongoing illegal conduct could be inferred. Petitioner's conduct was not of the sort contemplated by Congress as racketeering activity. However, the RICO statute is so vague that a person may run afoul of the

statute in ways never intended by Congress. A person of ordinary intelligence may not know what conduct is prohibited, thus allowing for arbitrary enforcement and application of the statute to persons like petitioner. As such, the statute is unconstitutional.

2. Petitioner has been denied due process of law inasmuch as the law as interpreted by this Court in **H.J. Inc.**, supra, which represented a substantive change from the law as interpreted by the Fifth Circuit in **R.A.G.S.**, supra, was retroactively applied to the evidence adduced at trial, without petitioner having had advance notice of the requirements of the law by which his conduct would be measured. Petitioner was tried under the clear past precedent of the Fifth Circuit: that evidence of two predicate acts, without more, would

suffice to establish a "pattern" of racketeering activity. The plaintiffs did not have to prove relatedness or continuity, and petitioner was not allowed to defend himself on that basis. At the time of the complained-of activities, petitioner was not on notice of the standard that would ultimately be applied to him and, thus, was deprived of the opportunity to conform his conduct to that standard.

3. Because petitioner was deprived of the opportunity to present evidence and argument to the jury on the issues of "relatedness" and "continuity," and because the jury did not make findings on those factual issues, petitioner suffered the loss of his right to have a jury examine and adjudicate the facts of his case. At the trial, he was deprived of the opportunity to present evidence to

exculpate himself from liability. Finally, petitioner was deprived of the right to have essential questions of fact determined by an impartial jury in violation of the Seventh Amendment to the United States Constitution. The three grounds upon which this petition is based combine synergistically to more than adequately show the egregious and intolerable violations of petitioner's rights. The judgment of the Fifth Circuit should therefore be reversed.

WHEREFORE, PETITIONER RESPECTFULLY PRAYS that this petition for writ of certiorari be granted and that after due proceedings are had, this Honorable Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's judgment holding petitioner liable to

respondents under the civil RICO statutes.

Respectfully submitted:

J. MINOS SIMON, LTD.
1408 West Pinhook Road
Post Office Box 52116
Lafayette, Louisiana 70505
Telephone: (318) 233-4625

BY: _____
J. MINOS SIMON
Bar Roll No. 12278

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR.,
ET AL

VS.

CIVIL ACTION
NUMBER 84-1786

POTOMAC INSURANCE
COMPANY OF
ILLINOIS, ET AL

SECTION O

SPECIAL INTERROGATORIES
(Filed February 4, 1987)

1. Do you find by a preponderance of the evidence that any of the following parties violated Section 12(1) of the Securities Act of 1933 for offering and selling unregistered securities to the public, if required to be registered?

(Answer Yes or No)	Yes	No
Joe E. Fryar	✓	
Wright, Lindsey & Jennings and its insurers, Valley Forge Insurance Company	✓	
Rodney Kendrick	✓	

(Answer Yes or No)	Yes	No
All American Services Co, Ltd.	✓	
William Skye	✓	
Joseph D. Hancock and Hancock, Joseph & Daniel	✓	
Swink & Co., Inc.	✓	
John W. Peck	✓	

2. Do you find by a preponderance of the evidence that any of the following parties violated Section 12(2) of the Securities Act of 1933 for making material misstatements or omissions of material fact in connection with the offer or sale of the Westside Bonds?

(Answer Yes or No)	Yes	No
Joe E. Fryar	✓	
Wright, Lindsey & Jennings and its insurers, Valley Forge Insurance Company	✓	

(Answer Yes or No)	Yes	No
Rodney Kendrick	✓	
All American Services Co, Ltd.	✓	
William Skye	✓	
Joseph D. Hancock and Hancock, Joseph & Daniel	✓	
Swink & Co., Inc.	✓	
John W. Peck	✓	

3. Do you find by a preponderance of the evidence that any of the following parties violated Rule 10b-5(2) of the Securities and Exchange Act of 1934 by making any untrue statement of a material fact or by omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading in connection with the purchase or sale of Westside Bonds?

(Answer Yes or No)	Yes	No
Joe E. Fryar	✓	
Wright, Lindsey & Jennings and its insurers, Valley Forge Insurance Company	✓	
Rodney Kendrick	✓	
All American Services Co, Ltd.	✓	
William Skye	✓	
Joseph D. Hancock and Hancock, Joseph & Daniel	✓	
Swink & Co., Inc.	✓	
John W. Peck	✓	

4. Do you find by a preponderance of the evidence that any of the following parties violated Rules 10b-5(1) and 10b-5(3) of the Securities & Exchange Act of 1934 for employing fraudulent, deceptive and manipulative acts and

practices in connection with the purchase or sale of Westside Bonds?

(Answer Yes or No)	Yes	No
Joe E. Fryar	✓	
Wright, Lindsey & Jennings and its insurers, Valley Forge Insurance Company	✓	
Rodney Kendrick	✓	
All American Services Co, Ltd.	✓	
William Skye	✓	
Joseph D. Hancock and Hancock, Joseph & Daniel	✓	
Swink & Co., Inc.	✓	
John W. Peck	✓	

5. Do you find by a preponderance of the evidence that any of the following parties aided or abetted violations of the securities laws under Rule 10b-5?

(Answer Yes or No)	Yes	No
Joe E. Fryar	✓	
Wright, Lindsey & Jennings and its insurers, Valley Forge Insurance Company	✓	
Rodney Kendrick	✓	
All American Services Co, Ltd.	✓	
William Skye	✓	
Joseph D. Hancock and Hancock, Joseph & Daniel	✓	
Swink & Co., Inc.	✓	
John W. Peck	✓	

6. Do you find by a preponderance of the evidence that any of the following parties, either as principals, or as aiders or abettors, violated the Louisiana Blue Sky Law for failure to register the securities, if required to be registered, with the Louisiana

Securities Commission or for making material misrepresentations and omissions in connection with the offer and sale of Westside bonds?

(Answer Yes or No)	Yes	No
Joe E. Fryar	✓	
Wright, Lindsey & Jennings and its insurers, Valley Forge Insurance Company	✓	
Rodney Kendrick	✓	
All American Services Co, Ltd.	✓	
William Skye	✓	
Joseph D. Hancock and Hancock, Joseph & Daniel	✓	
Swink & Co., Inc.	✓	
John W. Peck	✓	

7. Do you find by a preponderance of the evidence that any of the following parties, either as principals, or as aiders or abettors, violated Louisiana

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8. Do you find by a preponderance of the evidence that any of the following parties violated Section 1962(a) of the RICO Act?

(Answer Yes or No)	Yes	No
Joe E. Fryar	✓	
All American Services Co, Ltd.	✓	

9. Do you find by a preponderance of the evidence that any of the following parties violated Section 1962(b) of the RICO Act?

(Answer Yes or No)	Yes	No
Joe E. Fryar	✓	
All American Services Co, Ltd.	✓	

10. Do you find by a preponderance of the evidence that any of the following parties violated Section 1962(c) of the

RICO Act, for conducting or participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity involving mail fraud, wire fraud, or violations of the federal securities laws?

(Answer Yes or No)	Yes	No
Joe E. Fryar	✓	
All American Services Co, Ltd.	✓	

11. If plaintiffs have shown that any parties violated any of the laws enumerated in Questions One through Six, plaintiffs must also show that by reason of the parties' violation of these laws, plaintiffs were injured.

Do you find by a preponderance of the evidence that plaintiffs were injured by reason of any party's violation of these laws?

(Answer Yes or No)

Yes ✓ No _____

(Note: If you answered this question "Yes" proceed to Question Twelve, Thirteen, Fourteen, Fifteen. If you answered this question "No" proceed to Question Sixteen.)

12. What amount of money do you find would compensate plaintiffs for the difference between the purchase price paid and the actual cash value of Westside bonds on the date those bonds were issued?

(Answer in Dollars) $ 0

13. What amount of money do you find would compensate plaintiffs for the difference between the rate or return which the plaintiffs were promised they would receive on their original

investment and the return they have actually received and will receive in the future?

(Answer in Dollars) $ 9,594,000.00

14. If you answered "Yes" to Question Seven, what amount of money, if any, do you find would compensate the plaintiffs for damages sustained as a result of intentional or negligent misrepresentations or omissions and/or for breach of fiduciary duty?

(Answer in Dollars) $ 2,200,000.00

15. If you answered "Yes" as to any party in Question One through Seven, what percentage, if any, of the damages do you attribute to each party that caused injury to the plaintiffs?

Joe E. Fryar	30%
All American Services Co, Ltd.	30%
Wright, Lindsey & Jennings and its insurers, Valley Forge Insurance Company	10%
Rodney Kendrick	5%
Joseph D. Hancock and Hancock, Joseph & Daniel	10%
William Skye	5%
Swink & Co., Inc.	5%
John W. Peck	5%

(Note: The total of the percentages given in your answer to Question Fifteen must equal 100%.)

16. If plaintiffs have shown that any party violated any of the laws enumerated in Questions Eight through Ten, plaintiffs must also show that, by reason of the parties' violation of these

laws, plaintiffs were injured in their business or property.

Do you find by a preponderance of the evidence that plaintiffs were injured in their business or property by reason of any party's violation of Sections 1962(a) and/or 1962(b) and/or 1962(c) of the RICO Act?

(Answer Yes or No)

Yes ✓ No _____

(Note: Proceed to Question Seventeen only if you answered this question "Yes." Proceed to Question Eighteen if you answered this question "No.")

17. What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate plaintiffs for their damages, if any, proximately caused by the parties'

violation of Sections 1962(a) and/or 1962(b) and/or 1962(c) of the RICO Act?

(Answer in Dollars and cents, if any)

Answer: $ 850,000.00

18. If you find that All American Services Co., Ltd. has committed violations of any of the laws enumerated in Questions One through Ten, do you further find that All American Services Co., Ltd. received a windfall profit as a direct and proximate result of these violations?

(Answer Yes or No)

Yes ✓ No _____

(Note: If your answer to Question Eighteen is "Yes", proceed to Question Nineteen. If your answer to Question Eighteen is "No", proceed to Question Twenty.)

19. What sum of money do you find from a preponderance of the evidence would fairly represent the amount of All American Services Co., Ltd.'s windfall profit.

(Answer in Dollars and cents.)

Answer: $ 2,950,000

20. Do you find by a preponderance of the evidence that David Menz and/or Wright, Lindsey & Jennings committed legal malpractice which was a legal cause of plaintiffs' damages?

(Answer Yes or No)

Yes ✓ No _____

(Note: If you answered "Yes" to Question Twenty, proceed to Question Twenty-one.)

21. What amount of money, if any, do you find would compensate the

plaintiffs for damage sustained as a result of the legal malpractice?

(Answer in Dollars) $ 300,000.00

SO SAY WE ALL.

/s/ Stephen M. illegible
FOREPERSON

Opelousas, Louisiana
Date: February 4, 1987.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., ET AL.	*	CIVIL ACTION
	*	NO. 84-1786
VERSUS	*	
	*	SECTION "O"
POTOMAC INSURANCE COMPANY OF ILLINOIS, ET AL.	*	MAGISTRATE DIVISION

J U D G M E N T
(filed February 19, 1987)

This action came on for jury trial before the Court on December 8, 1986, with the Honorable John M. Shaw, District Judge presiding, and the issues having been duly tried and a verdict having been duly rendered in favor of plaintiffs on February 4, 1987;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs, Edward C. Abell, Jr. and

Carey Walton, and the class of purchasers of Westside Habilitation Center Revenue Bonds, and against defendants Joe E. Fryar, All American Services Company, Ltd., Wright, Lindsey and Jennings and Valley Forge Insurance Company jointly and severally in the full and true sum of $6,715,800, together with interest thereon at the rate of 12% from July 5, 1984, the date of judicial demand, until payment, together with taxable court costs and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of all plaintiffs and against defendants Joe E. Fryar, All American Services Company, Ltd., Wright, Lindsey & Jennings and Valley Forge Insurance

Company in solido in the full and true sum of $1,540,000, with interest thereon at the rate of 12% per annum from date of judicial demand until date of payment, together with taxable court costs and attorneys' fees as set forth below. This portion of the judgment is a part of and encompassed within the award made in the above paragraph. Hence, if recovery is had under the award made in the above paragraph, this portion of the judgment is duplicative and shall not be exigible.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all plaintiffs and against defendants, Joe E. Fryar and All American Services Company, Ltd., jointly and severally in the full and true sum of $2,550,000, together with interest

thereon from date of this judgment until date of payment, together with all costs of the suit and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of all plaintiffs and against All American Services Company, Ltd. in the full and true sum of $2,950,000, together with interest thereon from date of this judgment until date of payment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of all plaintiffs and against Wright, Lindsey and Jennings and Valley Forge Insurance Company in solido in the full and true sum of $300,000, together with interest thereon at the rate of 12% from

date of judicial demand until date of payment, together with all costs of these proceedings. This portion of the judgment is also encompassed within and a part of the award made in the first paragraph. Hence, if recovery is had under the award made in the first paragraph, this portion of the judgment is duplicative and shall not be exigible.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of all plaintiffs and against Joe E. Fryar, All American Services Company, Ltd., Wright, Lindsey & Jennings, and Valley Forge Insurance, in solido, in the full and true sum of $2,567,323.80, representing reasonable attorneys' fees, together with taxable costs of this proceeding to be determined upon the

plaintiffs' submission of their bill of costs. Of this amount, only $2,117,323.00 shall be payable to counsel for plaintiffs and the balance shall be paid to the plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiffs and against Joe E. Fryar and All American Services Company, Ltd., in solido, for the full true sum of $263,743.00, representing costs and expenses of this litigation compensable under the RICO statute but not taxable under 28 U.S.C. 1920. Of this amount, $64,071.29 shall be payable to counsel for plaintiffs and the balance shall be paid to plaintiffs.

OPELOUSAS, LOUISIANA, this 19th day of February, 1987.

ROBERT H. SHEMWELL,
Clerk of Court, United States
District Court for the Western
District of Louisiana
By: /s/ Mildred Baker
Mildred Baker, Deputy Clerk

Approved as to form:

/s/ John M. Shaw
John M. Shaw, United
States District Judge

Judgment Entered 2-19-87

By /s/ Rita V. Watkins

Notice to:

Wittman	Goudelocke
Ouris	Weens III
Hamilton III	Stafford, Jr.
Provosty, Jr.	Frankhauser
Odom	Nunnally, III
Smith	Downing
Humphries, Jr.	Welch
Breaux	Davidson
Sommer	Munsterman
Stahl	Mayer
Bienvenu	Schomp
Melichar	
Simon	
Alltmont	

Edward C. ABELL, Jr. and Carey Walton, Plaintiffs-Appellees Cross-Appellants,

v.

POTOMAC INSURANCE COMPANY, et al., Defendants,

Joe E. Fryar, Wright, Lindsey and Jennings, and Valley Forge Insurance Company, Defendants-Appellants Cross-Appellees.

No. 87-4260

United States Court of Appeals
Fifth Circuit.

Nov. 2, 1988.

Rehearing and Rehearing En Banc Denied
Dec. 14, 1988.

Bond purchasers brought action against developer whose company issued the bonds, bond counsel, and others. The United States District Court for the Western District of Louisiana, John M. Shaw, J., entered judgment on jury verdict in favor of plaintiffs on all

claims, and defendants appealed. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) bond counsel and person whose corporation issued the bonds were not "sellers" for purposes of the Securities Act or the Louisiana Blue Sky Law; (2) statements were shown to be material; (3) plaintiffs could not use Ute presumption or fraud on the market theory to show reliance by class; (4) plaintiffs did not show any reliance on statements made by bond counsel; (5) bond counsel could not be held liable on breach of fiduciary duty or other theories with respect to nonclients; (6) attorneys were not vicariously liable; (7) plaintiffs established RICO violation by developer whose corporation issued the bonds; (8) plaintiffs were not limited to out-of- pocket damages; and (9) developer

did not show that he was prejudiced by jury's knowledge of his attempt to bribe one juror.

Affirmed in part, reversed in part, and remanded.

J. Minos Simon, Lafayette, La., for Fryar.

D. Mark Bienvenu, Lafayette, La., for Valley Forge.

Gene W. Lafitte, Edward J. Gay, III, Julie F. Schwartz, James D. McMichael, James A. Brown, New Orleans, La., for Wright, Lindsey & Jennings.

Leslie R. Leavoy, Jr., Alexandria, La., for All American Services, Ltd.

Phillip A. Wittmann, Kyle Schoenkas, Judy Y. Barrasso, C. Lawrence Orlansky, New Orleans, La., for plaintiffs-appellees cross-appellants.

Appeal from the United District

Court for the Western District of Louisiana.

Before THORNBERRY, WILLIAMS, SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This is a civil case involving securities fraud, racketeering, and pendent state law claims. The plaintiffs, a class of investors who own bonds issued by the Westside Rehabilitation Center ("Westside"), allege that Joe Fryar, Westside's developer, and Wright, Lindsey & Jennings ("WLJ"), a Little Rock, Arkansas, law firm representing the bond issue's underwriters, fraudulently caused Westside to default on its bond interest payments, ultimately causing the bondholders to lose millions of dollars. After a two-month trial, the jury

returned a multi-million-dollar verdict in favor of the plaintiffs and against Fryar, WLJ, and their two co-defendants, All American Services, Inc. ("All American"), and Valley Forge Insurance Company ("Valley Forge"). The district court, which rejected all the defendants' motions for judgment notwithstanding the verdict, entered judgment upon this verdict and awarded plaintiffs damages totaling approximately $15 million. All of the defendants appealed from this judgment, but we dismissed All American's appeal for failure to prosecute. We now reverse and render the judgment against WLJ and Valley Forge, and affirm in part the judgment of liability against Fryar, and remand for redetermination of damages, interest and attorney's fees.

I. Facts as to the Merits.[1]

Westside, a non-profit corporation based in Cheneyville, Louisiana, was masterminded by its developer, Joe Fryar. Fryar originally conceived of Westside as a home for the mentally retarded, but he eventually changed Westside's targeted clientele to severely mentally and emotionally-disturbed patients. Fryar then prepared to translate his ideas into reality.

First, Fryar purchased 6.47 acres of land and a thirty-year-old vacant school building in Cheneyville (the "Cheneyville property") from the Rapides Parish School Board on January 3, 1978, for the sum of $100,000, its appraised value. Fryar

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[1] We recite the facts of this case in the light most favorable to the jury's verdict.

then incorporated Westside in 1979. At its inception, Westside had no capital assets; rather, its sole source of revenue and assets initially was to be the sale of bonds. Thereafter, Westside would rely on revenues paid by the State of Louisiana Medicaid program, which revenues would be used to retire the bonds.

Fryar hired his attorney, William Skye, to prepare the incorporation papers. Although a five-member board of directors was appointed, the board never collectively made any decisions on behalf of Westside. Rather, Fryar continued to control Westside and make all its decisions, including the purchase price for the Cheneyville property and the fees to be paid Fryar. Throughout the period relevant to this appeal, Fryar continued

to run Westside.

Fryar's initial problems involved obtaining a certificate of need for Westside[2] and the capital funds necessary to launch the project. Ultimately, Westside succeeded in obtaining its certificate of need, despite some opposition from officials in the Louisiana Department of Health and Human Resources. Fryar, however, found it considerably more difficult to procure capital funding for Westside.

Fryar knew that building the Westside facility and starting up its operations would cost millions of

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[2] Medical facilities that receive Medicaid reimbursements must have a certificate of need. Since Westside was designed to rely upon Medicaid as its only source of funding, Westside's existence depended upon Fryar's ability to obtain that certificate.

dollars. To raise the needed capital, he decided to market bonds. Initially, Fryar hired the nationally-known financial feasibility firm of Booz, Allen & Hamilton, Inc. ("Booz, Allen"), to evaluate the Westside project.

Booz, Allen dealt the Westside project its first blow. In a report dated July 23, 1979, the firm concluded that Westside was not financially feasible. Booz, Allen found several areas of concern, including (1) the possibility that the state medicaid program would impose ceilings on medicaid reimbursement; (2) the difficulties Westside would encounter in retiring its debt, since it depended entirely upon medicaid reimbursements and lacked adequate sources of working capital; and (3) the inherent faults of the Westside

concept in a state whose prevailing policies required placing Westside's potential patients in group homes.

The study caused Fryar to change his targeted clientele to emotionally-disturbed and mentally-retarded patients, but even this change did not alter Booz, Allen's decision. After Fryar threatened Booz, Allen with suit because of its adverse conclusions, Booz, Allen agreed to sign a letter drafted by WLJ's predecessor as bond counsel, the Boston law firm of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo ("Mintz, Levin"). That epistle noted only the change in clientele and stated that Booz, Allen's conclusions may not necessarily still be applicable. The letter from Booz, Allen did not solve Fryar's problems, because he still did not have a favorable

feasibility study.

Undeterred, Fryar retained Real Estate Research Corporation ("RERC"), experienced primarily in appraising real estate, to conduct a feasibility study. RERC ultimately delivered a favorable report. Meanwhile, Fryar encountered other difficulties in effecting a bond issue to fund Westside. he initially asked the Louisiana State Bond Commission for permission to finance the project through the Louisiana Public Facilities Authority; citing a variety of concerns, the Commission declined to approve financing for Westside bonds. Shortly thereafter, Westside's bond counsel, the New York law firm of Mudge, Rose, Guthrie & Alexandrer, resigned. Some time later, Westside retained John W. Peck of Peck, Shaffer & Williams as the new bond

counsel.

Ultimately, Fryar convinced the Town of Cheneyville to back a $12,850,000 municipal bond issue. Later, and somewhat mysteriously, the bond authorization was increased to $18,550,000. Having described Fryar's long and successful struggle to obtain backing for the bond issue, we turn to how Fryar arranged Westside's finances.

Fryar had determined that he needed to receive over $5,000,000 to renovate, construct, and operate the Westside facility for an estimated seven months until it became self-sufficient. Westside's final offering statement for the bonds indicates that Westside also planned to expend over $3,200,000 in interest payments on the bonds, over $2,100,000 for debt service, more than

$1,000,000 as an underwriter's discount, and $2,459,700 for "acquisition of center." The offering statement does not reveal in explicit detail how Westside actually acquired its facilities, and the failure of the offering statement to explain that transaction more thoroughly is at the heart of this multi-million-dollar litigation.

Fryar planned to issue the revenue bonds in the following denominations and maturities:

Interest Rate	No. of Bonds	Face Amount	Total Amount	Due Date
16.50%	7,790	$5,000	$ 8,950,000	Oct. 1, 2013
16.25%	80	5,000	400,000	Oct. 1, 2002
16.00%	40	5,000	200,000	Oct. 1, 1998
14.00%	800	5,000	4,000,000	Oct. 1, 2013
	2,710		$13,550,000	

Until late 1981, Fryar owned the property eventually used to establish Westside. In 1981, he either contacted or helped create All American , a Bermuda corporation. Frequently using the mails and the wires to communicate messages and transmit documents, Fryar and All American eventually devised a complicated transaction to dispose of Fryar's interest in the land. Fryar, who had bought the land in 1978 for $100,000, agreed to sell this land to All American for $150,000. All American then sold the land to Westside for $2,479,000 - $2,000,000 in Westside bonds and the remainder in cash. All American, retaining its ownership interest in the bonds, allowed Fryar to pledge those bonds to secure Fryar's performance of his duties as the developer of the

project.

This transaction accomplished several things for Fryar and All American. First, it allowed Fryar to make a 50-percent up-front profit from owning the land for only three years. Second, it produced a profit for All American of over $2,300,000 - a profit which by itself was over 15 times what All American had originally paid. Third, it allowed All American to enjoy the benefits of owning $2,000,000 worth of tax-exempt municipal bonds, including the interest payments periodically due on those bonds. Finally, it allowed Fryar to claim that he had pledged over $2,000,000 of bonds to the completion of the Westside project and thus to imply that he had over $2,000,000 of his own money at risk in the project.

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At this point, Fryar began to rely

upon the professionals preparing the Westside bonds for market. Those professionals included Joseph Hancock and his underwriting firm, Hancock, Joseph & Daniels; Skye, Westside's attorney; Peck, whose firm of Peck, Shaffer & Williams continued to serve as bond counsel; Robert Sheddy of Swink & Co., the other underwriter for the bond issue; and Mintz, Levin, then counsel for the two underwriters. Just before Westside's scheduled closing and issuance of the bonds, Mintz, Levin resigned as underwriter's counsel, purportedly because the associate working on the Westside bond offering left Mintz, Levin to join another law firm. When that associate departed in February 1982, there were only a few weeks left until Westside was scheduled to close its bond

deal with the underwriters.

Under these circumstances, the underwriters immediately hired WLJ as their counsel. WLJ at once launched into preparing the bond offering to satisfy the securities laws of two dozen or more states. At the same time, WLJ assumed strict "due diligence" duties. WLJ was responsible (to its clients, at least) for carefully reviewing the final offering statement and for interviewing all the key participants to the bond transaction and those people necessary to the success of Westside project. According to the expert testimony of James Perkins, an experienced securities lawyer from Boston, WLJ failed seriously in its due diligence duties to investigate the bond transaction, and thus failed to uncover the details of the

Cheneyville land transaction and some of the details of Westside's history.

The offering statement, which the underwriters (WLJ's new clients) prepared, contained many of the relevant facts bearing on the Westside project. However, the offering statement did not reveal everything we now know. For instance, the final offering statement did not contain any information about the Booz, Allen report.[3] Moreover, the final offering statement reported that All American had sold the Cheneyville land to Westside for $2,479,000, but it did not

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[3] David Menz, the WLJ partner who represented the underwriters, testified that he thought the Booz, Allen feasibility report was irrelevant because the subsequent Booz, Allen letter seemed to suggest that the change in targeted clientele made the old report obsolete.

add that Fryar had once owned the land, nor did it report any of the details of the transaction between Fryar and All American. Finally, the offering statement reported flatly that Fryar had pledged $2,000,000 of Westside bonds to the success of the project, leaving the distinct impression, even in Menz's mind, that Fryar had purchased the bonds himself and with his own money.

On April 20, 1982, the underwriters and Westside closed the bond deal. The underwriters subscribed to the entire issue of bonds and undertook the task of selling it. The underwriters sold the bonds at approximately par value (except for the 14% bonds, which were sold at a discount). The underwriters found no difficulty in selling Westside bonds, and the entire issue was marketed quickly.

Two of the new investors in Westside bonds were plaintiffs Carey Walton and Edward Abell, both of whom testified that they bought their bonds from Dick Hardwick, a broker for Swink. Walton said he relied upon the integrity and competence of the broker, with whom he had dealt before, and upon a flyer Swink had circulated without WLJ's advice, knowledge, or control. Abell testified that he relied upon Walton's glowing reports and Walton's confidence in Swink and its broker.

Both Abell and Walton testified that they would have evaluated Westside bonds differently had they known about the Booz, Allen study, the details of the Cheneyville land transaction, and the fact that Fryar had not pledged any of his own bonds or his own money to

complete the project. Both witnesses stressed heavily that the developer's apparent willingness to put $2,000,000 of his own money into the project impressed them greatly and influenced their decisions implicitly.

Over the next year and a half, the Westside story began to unravel. A bank failure and several delays cost Westside a substantial sum, though no more than $300,000. A local newspaper began to uncover the details of the Cheneyville land transaction. Litigation arising from the bank failure forced Swink to send a reassuring letter to all bondholders. In that letter, dated January 20, 1983, however, Swink revealed all the information that had been withheld from the offering statements.

In early July 1984, Abell and

Walton initiated this lawsuit on behalf of themselves and a class of 500 of Westside's bondholders. At that time, and for the next three months, Westside bonds continued to sell at or near their par value.

In October of 1984, Westside's financial structure finally collapsed. Westside defaulted on an interest payment on its bonds and ultimately was forced to file for Chapter XI bankruptcy in March 1985. The bondholders did not fare well in bankruptcy and, under Westside's reorganization plan, are now entitled to considerably lower interest payments than originally promised.[4] As a result of its

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[4] The bond indebtedness was restructured in bankruptcy so as to reduce the interest rates of the bonds as follows:

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bond in a timely fashion, and we have already dismissed its appeal for lack of prosecution. We now turn to the issues concerning each of the other three defendants, and to the question of whether they deserve a new trial because of jury tampering.

II. Section 12 of the Securities Act

First, the bondholders assert that Fryar and WLJ owe them rescissionary damages under section 12 of the Securities Act, 15 U.S.C. §771. WLJ and Fryar interpose a variety of defenses, among which is the claim that neither qualifies as a "seller" under either section 12(1) or section 12(2). Since only a statutory "seller" can be held liable under section 12, this defense, if correct, would completely absolve WLJ and Fryar.

We begin our analysis, as always, with the language of the statute itself. Under section 12, "[a]ny person who . . . offers or sells a security" in violation of the section's provisions "shall be liable to the person purchasing such security from him." 15 U.S.C. §771.[6]

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[6] Section 12 reads in its entirety:

> Any person who -
>
> (1) offers or sells a security in violation of section 77e of this title, or
>
> (2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser

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We do not begin with a blank slate, however, since the Supreme Court has recently interpreted this language authoritatively.

In Pinter v. Dahl, ___ U.S. ___, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988), the Supreme Court decided whom courts may treat as "sellers" under section 12. Pinter, an oil and gas producer who sold

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> not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

securities, sought contribution from Dahl to satisfy a judgment in favor of investors who had purchased unregistered securities from Pinter. Pinter argued that Dahl should share in Pinter's section 12(1) liability,[7] since Dahl had actively promoted the securities among his friends and relatives, the disgruntled investors in the original suit. Dahl replied that he had merely recommended the Pinter securities because he had thought that they would benefit their owners. Dahl argued that he could not be a "seller" under section 12(1) because he had not acted from a motivation of personal gain.

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[7] Section 5 of the Securities Act, 15 U.S.C. §77e, prohibits the sale of unregistered securities not exempted under section 3 of the Securities Act, 15 U.S.C. §77c.

The Court first analyzed the language of the statute which we have set out above. The Court noted that the term "seller," which includes anyone who "offers . . . a security," is not restricted to those who pass title in securities to investors:

> Section 2(3) defines 'sale' or 'sell' to include 'every contract of sale or disposition of a security or interest in a security, for value,' and the terms 'offer to sell,' 'offer for sale,' or 'offer' to include 'every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.' 15 U.S.C. §77b(3).... The inclusion of the phrase 'solicitation of an offer to buy' within the definition of 'offer' brings an individual who engages in solicitation, an activity not inherently confined to the actual owner, within the scope of §12.... 'The statutory terms ["offer" and "sell"], which congress expressly intended to define broadly, ... are expansive enough to encompass the entire selling process, including the seller/agent transaction.'

Pinter, 108 S.Ct. at 2076-77 (quoting

United States v. Naftalin, 441 U.S. 768, 773, 99 S.Ct. 2077, 2082, 60 L.Ed.2d 624 (1979)).

Although the Court held that the "offers or sells" phrase in section 12 does not limit greatly the scope of section 12(1), it reasoned that the "purchase from" language of section 12 further restricts the range of potential sellers. The Court held that a defendant is not a "seller" unless the defendant "would commonly be said, and would be thought by the buyer, to be among those 'from' whom the buyer 'purchased'...." Id. at 2077. Siding with Dahl, the Court added:

> When a person who urges another to make a securities purchase acts merely to assist the buyer, not only is it uncommon to say that the buyer 'purchased' from him, but it is also strained to describe the giving or gratuitous advice, even strongly or enthusiastically, as 'soliciting.'

> ... The language and purpose of §12(1) suggest that liability extends only to the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner.

Id. at 2078-79.

The definition of "seller," as the Pinter court has articulated it, requires us to make two inquiries: (1) Who passed title to the plaintiff or solicited the transaction in which title passed; and (2) from whom did the plaintiff buy the security? We may answer the first question according to the standards of legal parsing and linguistic analysis, but to answer the second question, we must refer to common usage.

Here, all of the plaintiffs bought Westside bonds from brokers or previous owners. Some of the plaintiffs, like Abell and Walton, bought their bonds from

employees (who were brokers) of Wink & Co., one of the underwriters. It might be said that everyone who invested in the initial offering bought from the underwriters and Westside, the issuer.[8] None of the investors, however, can say that he or she bought bonds from the developer of the project which the bond issue supports, or from one of the law

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[8] Like automobile manufacturers, issuers create distribution chains composed of independent businesses aligned for a single purpose: to sell the product. Just as Ford and General Motors never sell directly to consumers, many issuers never sell their securities directly to investors. Nonetheless, automobile manufacturers engage in intensive marketing campaigns to convince the public to buy their products from dealerships readily identified with the manufacturer. Consequently, one often hears that someone "has bought a new car from Ford." To the extent that issuers and underwriters use an analogous system to distribute securities, they too may be sellers from whom one buys products.

firms that helped to prepare the offering statement. If we apply the principles of Pinter to this case, we must hold that neither Fryar nor WLJ is a "seller" under section 12(2).

The bondholders suggest that Pinter is inapposite here. They do not deny that the "sell or offer" and "purchase from" language of section 12(2) is identical to the language the Court interpreted in Pinter. They note, however, that the Court explicitly reserved the right to interpret the section 12(2) language differently. See 108 S.Ct. at 2076 n. 20.

The plaintiffs contend that policy reasons favor divergent interpretations of the identical words of sections 12(1) and 12(2). They argue that the Court singled out section 12(1) because it

imposes strict liability upon anyone who sells unregistered securities. Rather than import fault-based concepts, including proximate cause, to interpret section 12(1), the Court stuck closely to the language of section 12(1).

Thus, the Court (so sayeth the bondholders) rejected the substantial-factor test previously applied in this circuit[9] because that test defines as a "seller" anyone who proximately caused a securities transaction. The bondholders

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[9] We previously had defined a "seller" as (1) one who parts with title to securities in exchange for consideration or (2) one whose participation in the buy-sell transaction is a substantial factor in causing the transaction to take place. Dahl v. Pinter, 787 F.2d 985, 990 (5th Cir. 1986), vact'd, ___ U.S. ___, 108 S.Ct. 2063, 100 L.Ed.2d 658 (1988) (citing our prior cases), on remand, 857 F.2d 262 (5th Cir. 1988)

argue that the Court would accept the substantial-factor analysis to determine who is a section 12(2) seller because Congress incorporated traditional fault concepts into the elements of that subsection.

The Court, however, explicitly based its interpretation upon the plain language of section 12(1), not upon other factors, and presumably would do the same with section 12(2). Pinter teaches that

> [t]he deficiency of the substantial-factor test is that it divorces the analysis of seller status from any reference to the applicable statutory language and from any examination of §12 in the context of the total statutory scheme.... Thus, although the substantial-factor test undoubtedly embraces persons who pass title and who solicit the purchase of unregistered securities as statutory sellers, the test also would extend §12(1) liability to participants only remotely related to the relevant aspects of the sales transaction. Indeed, it might expose securities professionals, such as accountants

> and lawyers, whose involvement is only the performance of their professional services, to §12(1) strict liability for rescission. The buyer does not, in any meaningful sense, "purchas[e] the security from' such a person.

108 S.Ct. at 2080-81 (footnote omitted, emphasis added). Finally, the Court issued this warning:

> 'The ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law.' Touche Ross & Co. v. Redington, 442 U.S. [560] at 578, [99 S.Ct., 2479, at 2490, 61 L.Ed.2d 82 (1979)].... The ascertainment of congressional intent with respect to the scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section. See Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 472 ... [97 S.Ct. 1292, 1300, 51 L.Ed.2d 480] (1977).

Id. at 2082.

We cannot ignore so plain a command. We hold that neither Fryar nor WLJ was a "seller" under section 12.

III. Rule 10b-5 Claims.

Plaintiffs claim further that the defendants committed securities fraud in violation of section 10(b) of the Exchange Act. "To make out a claim under Section 10(b), which is based on the common law action of deceit, the plaintiff must establish (1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused his injury." Huddleston v. Herman & McLean, 540 F.2d 534, 543 (5th Cir. Unit A Mar. 1981), rev'd in part on other grounds, 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983).[10] The plaintiffs claim that they

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[10] Section 10(b) plaintiffs must also prove that the defendants committed the alleged fraud "in connection

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introduced substantial evidence to prove each of these elements against each of the defendants.

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with a purchase or sale of securities," but that element is not in doubt here.

§10(b) reads, in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange - ...
>
> (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest for the protection of investors.

Rule 10b-5 reads:

> It shall be unlawful for any person, directly or indirectly, by the use of any

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The defendants do not assert that they never said or wrote anything false or misleading. However, the defendants do challenge the legal sufficiency of the bondholders' proof of materiality, reliance, and causation. WLJ also argues that it did not have the necessary scienter to violate rule 10b-5.

> means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
>
> 17 C.F.R. §240.10b-5 (1987).

We will consider materiality first, followed by causation and reliance. Later, we will discuss WLJ's scienter arguments when we examine the potential for derivative rule 10b-5 liability under theories which the bondholders aim specifically at WLJ.

A. Materiality.

The defendants contend that the plaintiffs' complaints were not material. The defendants (but especially Fryar) question whether Westside said (or failed to disclose) anything that would have affected any investor's decision to buy Westside bonds. Defendants point out that none of the facts they distorted made any difference to investors when ultimately, in a January 1983 letter,

Westside revealed all relevant facts.'' Despite these revelations, the price (and apparently, the trading volume) of Westside bonds remained stable. Neither did the commencement of this lawsuit have any appreciable affect upon the market value of Westside bonds. From these facts, defendants conclude, as a matter of law, that the information which plaintiffs allege Westside fraudulently withheld was not material.

'' That letter, designed to calm investors' fears, disclosed the $2.4-million profit Fryar and All American collectively had made from selling land to Westside. It also revealed that Fryar used the money generated from this land transaction, not money originally his own, to secure his personal bonds backing the project. Finally, the letter reported the negative assessment which Booz, Allen had made of Fryar's 1983 Westside plans.

We begin by reviewing the standard for determining when a fact is material. For the purposes of the securities laws, "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S.Ct. 2126, 2132, 48 L.Ed.2d 757 (1976). To be a material fact, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Id. The court has recently adopted these tests to determine materiality in all rule 10b-5 cases. Basic Inc. v. Levinson, ___ U.S. ___, 108 S.Ct. 978, 983, 99 L.Ed.2d 194 (1988).

Given this standard, we believe that the record sufficiently supports plaintiffs' position. The jury was entitled to believe that information that would have affected the market for Westside's initial offering would not have had the same effect two or three years later. Indeed, the jury heard expert testimony that Westside could not have marketed its bonds at all had it revealed the details of the Fryar-All American-Westside land transaction or of the Booz, Allen study.

Sheddy, who on behalf of underwriter Swink helped prepare the offering statement, admitted that the unreported facts were material. The brokers at Swink's Atlanta office deemed the information so significant that they offered to buy back Westside bonds from

their customers when they first learned the truth. According to one of these brokers, Fryar's assurances that his own funds backed Westside significantly enhanced the project's image as a secure investment. This evidence sufficiently supports the jury's conclusions that Abell proved that a reasonable investor would have evaluated Westside's initial offering differently had all the information been available originally.

B. Causation.

Fryar attacks the sufficient of the evidence to prove that Westside misrepresented facts that caused its eventual bankruptcy and thus the reduction in the interest rates the bonds bore. To prove causation, the bondholders must prove

> That the untruth was in some reasonably direct, or proximate, way

> responsible for [their] loss. The causation requirement is satisfied in a Rule 10b-5 case only if the misrepresentation touches upon the reasons for the investment's decline in value. If the investment decision is induced by misstatements or omissions that are material and that were relied on by the claimant[s], but are not the proximate reason for [their] pecuniary loss, recovery under the Rule is not permitted.

Huddleston, 640 F.2d at 549 (footnote omitted).

Fryar asserts that the facts Abell would like to have known when Westside first offered its bonds have nothing to do with the causes of Westside's default on interest payments or its eventual bankruptcy.[12] He blames the bankruptcy of Penn Square Bank, which he contends dramatically affected Westside's cash

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[12] Westside's reorganization plan significantly lowered the interest rate borne by Westside bonds.

position at a critical point in the project's development. Fryar argues that a change in state health-care reimbursement policies destroyed whatever hope Westside had of weathering its cash flow crunch. According to Fryar, these two combined factors forced Westside into bankruptcy.

The jury, however, found otherwise. The Cheneyville land transaction consumed a substantial portion of Westside's working capital. Of a $13.5 million bond offering, nearly $2.5 million - most of which Fryar and All American secreted for their own undisclosed use - was dedicated to this single transaction. In comparison, the Penn Square Bank failure cost Westside on $300,000 at most. Indeed, Fryar's own witness conceded that state healthcare officials froze

reimbursements to Westside when they first learned of the true details of the Cheneyville land transaction. The jury was entitled to believe that this real estate deal "touched upon" the reasons for Westside's ultimate bankruptcy.[13] Hence, causation was sufficiently established.

C. Reliance.

The defendants also argue that the plaintiffs failed to prove that any plaintiff relied upon any fraudulent representations or omissions. The

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[13] We express no opinion regarding any other of Abell's theories of this case (e.g., that the Booz, Allen study revealed otherwise-undisclosed facts that contributed to Westside's bankruptcy). Our task is not to justify the jury verdict, but to ascertain whether the evidence sufficiently supported at least one view of the facts to permit a verdict for the plaintiffs.

element of reliance is the subjective counterpart to the objective element of materiality. Whereas materiality requires the plaintiff to demonstrate how a "reasonable" investor would have viewed the defendants statements and omissions, reliance requires a plaintiff to prove that it actually based its decisions upon the defendants' misstatements or omissions. "Reliance is cause sine qua non, a type of 'but for' requirement: had the investor known the truth he would not have acted." Huddleston, id. at 549 (footnote omitted). Thus,

> [c]ourts sometimes consider the reliance component of the Rule 10b-5 action to be a part of the causation element. In this context, the term 'transaction causation' is used to describe the requirement that the defendant's fraud must precipitate the investment decision.... On the other hand, 'loss causation' refers to a direct causal link between the misstatement and the claimant's economic loss.

Id. at 549 n. 24 (citation omitted).

1. Proving Reliance for the Class as a Whole.

Since rule 10b-5 plaintiffs must prove that each plaintiff subjectively relied upon the defendants misstatements and omissions, the jury may not infer the reliance of an entire class of plaintiffs from the testimony of a few. "Consequently, in a class action, while the materiality element can be established for the class as a whole, reliance, like damages, is a matter of individual proof." Huddleston, id. at 549 (citation omitted).

Here neither side introduced any evidence to demonstrate or refute whether most of the class members decided to buy Westside bonds in reliance upon what the defendants said or failed to say.

Whether the jury was permitted to infer reliance from the evidence, therefore, depends entirely upon who bore the burden of persuasion. That burden ordinarily rests with plaintiffs, but it may shift in those rare cases in which plaintiffs can prove that they are entitled to one of two presumptions.

The more venerable presumption, the so-called Ute presumption, is available to plaintiffs who can prove that the rule 10b-5 violations which they allege actually stem from defendants' failure to disclose pertinent information rather than from defendants' failure to tell the truth. The other presumption plaintiffs may invoke - the theory that defendants committed a fraud upon the marketplace - is of more recent vintage. We discuss each of these burdenshifting presumptions

in turn.

a. The Ute Presumption

The Ute presumption was first announced by the Supreme Court in Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972). There, an organization of native Americans organized a corporation to distribute its assets to its members. Each member received title to ten shares of stock that were deposited with a local bank. The bank entered into a fiduciary relationship with the new stockholders and assumed primary responsibility for enforcing title restrictions and providing other services related to the stock.

Ultimately, investors in surrounding communities developed an interest in the stock, and demand in these communities

outstripped the Utes' demand for the corporation's stock. The bank seized this opportunity quietly to build a non-native American clientele eager to invest in Ute stock. The native Americans, however, never heard about this secondary market for their stock, and the bank chose to keep them ignorant to exploit its potential financial gains.

When the Utes eventually did learn of the bank's scheme, eighty-five of them sued. The plaintiffs were Utes who, trusting in the bank, had sold their stock to the bank for prices that sometimes were significantly lower than what the bank could command in the open market. The native Americans complained that the bank had breached a fiduciary duty to them to disclose information about the secondary market, and sued the

bank for violating rule 10b-5. The bank responded in part by arguing that the plaintiffs had failed to prove reliance.

The Supreme Court held that the burden of proving reliance fell on the bank, not on the plaintiffs. As our subsequent cases have taught, the Ute presumption attaches only to those rule 10b-5 actions based primarily upon omissions rather than misrepresentations.[14]

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[14] To state a claim under rule 10b-5, a plaintiff must allege either that the defendant misrepresented material facts or omitted material facts which a pre-existing duty required it to disclose to the plaintiff. We have held that claims based upon misrepresentations sound in part 2 of rule 10b-5, whereas claims based upon omissions are founded upon parts 1 and 3 of the rule. See, e.g., Finkel v. Docutel/Olivetti Corp., 817 F.2d 356, 359-60 (5th Cir. 1987), cert denied, ___ U.S. ___, 108 S.Ct.

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Misrepresentations include statements that are themselves false - outright lies - and true statements that are nonetheless so incomplete as to be misleading, i.e., distorted half-truths. To omit a fact, however, is to say absolutely nothing about matters whose very existence plaintiffs have no reason to consider. The bank in Ute omitted material facts: The Utes simply had no idea that the bank itself actively solicited non-native-American investors to buy Ute stock.[15] These omissions were

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1220, 99 L.Ed.2d 421 (1988). See supra no. 10 for the text of rule 10b-5.

[15] To define more vividly the distinction between misrepresentations and omissions, we suggest the following hypothetical: Suppose a car owner, wishing to sell her vehicle, advertises in the newspaper that her

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not distorted half-truths, since the bank never made any statements regarding its activity in the secondary market.

Our cases indicate that the Ute presumption is limited to cases, like Ute

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(Continued from previous page) car has a "new" battery when she knows the battery is five years old. She has communicated an outright lie, and the basis of a fraud against her is falsehood (a category of misrepresentation). If a prospective buyer asks her, "How is the engine?", she might reply, "I've never had a problem with it." If, however, she has owned the car for only a few weeks, and knows that the previous owner had the engine rebuilt two months ago, she has distorted the truth by telling only part of it - another form of misrepresentation. Finally, assume the owner has decided to sell her automobile because a mechanic she knows considers the vehicle "not safe at any speed." Nonetheless, she tells this only to potential buyers who specifically ask her why she is selling the car. In this last case, the owner has omitted saying something about a particular material matter.

itself, in which the plaintiffs have based their complaint primarily upon alleged omissions. Such non-disclosures suits are those in which the complaint is grounded primarily in allegations that the defendant has failed to disclose any information whatsoever relating to material facts about which the defendants has a duty to the plaintiff to disclose. Ute, however, does not require the burden of persuasion to shift in cases where the plaintiffs allege either that the defendant has made false statements or has distorted the truth by making false but misleading incomplete statements. Thus, we apply the Ute presumption in non-disclosure cases, but not in falsehood of distortion cases. See, e.g., Finkel, 817 F.2d 359.

Here the bondholders characterize this case as involving primarily omissions. Their claim is that the offering documents represented that Westside was feasible, when it was not; that Fryar was to have $2 million of his own money in the transaction, when he did not; and that the real estate had a value or cost basis to Westside of over $2.4 million, when it did not. Although we have held these statements to have been both false and material, they are distortions, not omissions.

The bondholders have not argued that Fryar failed to disclose facts about which the investors had no inkling, but that Fryar purposely revealed only part of the truth in an effort to mislead potential purchasers. The plaintiffs attempted to portray the defendants as

creating an impression of Westside that was entirely false, induced by a deceptively misleading impression bout the offering; thus the plaintiffs are not entitled to the Ute presumption.

b. The Fraud-on-the-Market Presumption

The bondholders argue that we should assume that they relied upon the market for Westside bonds to set a fair price unadulterated by fraud. Under this theory of their case, the bondholders essentially contend that investors uniformly assume that an active and open securities market efficiently assimilates information about securities. The market then calibrates the price of a security to reflect precisely the security's value in light of all the information publicly available about that security. Provided that the publicly available information

is both accurate and complete, the market price contains the most accurate and succinct estimation of the true value of any given security at any given time. Consequently, investors, who must assume the integrity of the market and of those who trade in it, ordinarily rely heavily upon the market price in determining the values of securities.

This theory of the marketplace underlies a recent development in securities law - the "fraud-on-the-market" theory of reliance. A "fraud on the market" is any deceit that successfully disseminates false or misleading information into the securities market or withholds vital information from that market. Such a deceit defrauds investors even when they are unaware of the misrepresentations or

omissions that skew the market price, because investors depend heavily upon the integrity of the market price. Thus, the argument goes, courts should presume reliance in a class action because most (if not all) of the investors have relied upon the accuracy of a fraudulently distorted market price. See, e.g., Basic In. v. Levinson, 108 S.Ct. at 988-92.

In recent years, this theory of reliance rapidly has gained support. In Shores v. Sklar, 647 F.2d 462 (5th Cir. May 1981) (en banc), cert. denied, 459 U.S. 1102, 103 S.Ct. 722, 74 L.Ed.2d 949 (1983), we adopted a form of the fraud-on-the-market presumption of reliance. Since Shores, the Supreme Court in Basic Inc. v. Levinson has announced its support for a new, largely undefined version of this presumption of reliance.

Basic states only three propositions of law that are of interest here. First, the Court ruled that a trial court may presume reliance on the ground that the defendants committed a fraud on the market. Second, Basic explicitly holds that the "fraud-on-the-market" presumption is rebuttable and serves only to shift the burden of persuasion, as to reliance, onto securities fraud defendants. Finally, the Court vitiated part of our fraud-on-the-market jurisprudence.

Until Basic, we made the fraud-on-the-market presumption, like the Ute presumption, available only to plaintiffs who based their rule 10b-5 claims primarily upon nondisclosure. See, e.g., Finkel v. Ducotel/Olivetti Corp., 817 F.2d at 359. Basic, however, held that a

rule 10b-5 plaintiff alleging active misrepresentation (i.e., making false statements and failing to correct distorted statements) may also assert a fraud-on-the-market theory of reliance.[16]

> Recent empirical studies have tended to confirm Congress' premise that the market price of share traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.... Indeed, nearly every court that has considered the proposition has concluded that where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed.... An investor who buys or sells stock at the price set by the market does so in reliance on the integrity of that price. Because most publicly available information is reflected in market

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[16] The plaintiffs in Basic were former stockholders in a company that falsely denied the existence of merger talks. The plaintiffs sold their stock before the merger negotiations drove up stock prices.

> price, an investor's reliance on any public material misrepresentations, therefore, may be presumed for purposes of a Rule 10b-5 action.

Basic, 108 S.Ct. at 991-92 (footnotes omitted). Nonetheless, Basic essentially allows each of the circuits room to develop its own fraud-on-the-market rules. Consequently, we return to our own cases.

In Finkel, the most recent Fifth Circuit case to consider the fraud-on-the-market theory, we held that a rule 10b-5 plaintiff may establish fraud on the market in two different ways. First, the plaintiff can establish that the subject securities were traded on an active secondary market, such as a public exchange. In such a case, the plaintiff would prevail if he could prove that the defendant's non-disclosures materially affected the market price of the

security. 817 F.2d at 364.

Where, however, no active, efficient secondary market existed in which to trade the subject securities (as in Shores), the plaintiff must prove that "the defendants" conspired to bring to market securities that were not entitled to be marketed." Id. at 362. Shores states this same concept in slightly different terms:

> If [the plaintiff] proves no more than that the bonds would have been offered at a lower price or a higher rate, rather than that they would never have been issued or marketed, he cannot recover.... This theory is not that [the plaintiff] bought inferior bonds, but that the Bonds he bought were fraudulently marketed. The securities laws allow an investor to rely on the integrity of the market to the extent that the securities it offers to him for purchase are entitled to be in the market place.

Shores, 647 F.2d at 470-71.

The plaintiffs here argue first that

the market price, set in active bond markets, was distorted by defendants' fraud. The bondholders contend that Westside bonds were traded in an active secondary market through brokers. They add that Westside's finances, of which the public originally had only a materially distorted view, eventually caused the value of the bonds to collapse.

This argument, however, completely ignores Shores, which, in this respect, is factually indistinguishable from the present case. In Shores, as here, the defendants included private entrepreneurs who obtained a town's authorization to issue municipal bonds underwriting a local, private project. Both here and in Shores, the entrepreneurs hired underwriters to sell the new issue to the

public. In both cases, a small secondary market, exploited by brokers, developed for the bonds. However, the bonds in Shores, like the bonds here, were not actively traded on any exchange or in any large secondary market. As we observed later in Finkel,

> ... it is clear that the market for the bonds in Shores (industrial development bonds of the town of Frisco City, Alabama) does not represent the active, efficient market for which the fraud on the market theory was initially conceived.

Finkel, 817 F.2d at 364.

Next, the bondholders argue that they deserve the fraud-on-the-market presumption because the Westside offering was not entitled to be marketed. The bondholders point to several experts who testified that the Westside bonds were unmarketable. According to the plaintiffs' experts, Westside could not

have disclosed its true financial status and the negative conclusions of the Booz, Allen feasibility study without completely losing a market for their bonds. These experts also opined that no underwriter would have been willing to shoulder Westside's offering if the weight of the task included trying to explain away Fryar's suspicious land transactions and the Booz, Allen study.

The bondholders claim that this testimony proves that, like the securities in Shores, the Westside bonds were brought to market only through fraud, and were not entitled to be marketed at all. The defendants respond that only worthless securities are not entitled to be marketed under Shores. They argue that if the bonds retained any value at all, the plaintiffs have shown

"no more than that the bonds would have been offered at a lower price or a higher rate...." Shores, 647 F.2d at 470. According to the defendants, the plaintiffs' theory is only that they bought inferior bonds, not as Shores requires, that they bought bonds fraudulently brought to market. Id. at 471.

The bondholders argue that worthlessness is not a prerequisite, under Shores, for establishing a fraud on the market. The bondholders correctly note that the Shores plaintiffs recouped about 37 percent of their investment when the municipal assets dedicated to the failed corporation were liquidated. They conclude that the Shores stocks were not worthless and that worthlessness, therefore, cannot be the touchstone of a

fraud-on-the-market analysis.

This argument misses the point, since saleable assets may bless even the most worthless enterprise. In Shores, the illegitimate securities represented an investment in a hoax made to seem real because valuable assets, including a factory, backed the promoters' promises. Although the assets may have added value to the securities, the sham "business" did not because the promoters never intended to start a legitimate one.

We hold, therefore, that securities meet the test of "not entitled to be marketed" only where the promoters knew the enterprise itself was patently worthless. We add that expert testimony, however well-founded in the experience of securities traders, is nothing more than the speculation of observers benefiting

from hindsight. All of the careful analysis of securities pundits and expert calculations of experienced investors cannot replace the irrefutable knowledge gained from a single source: the actual track record of the security itself.

Shores established a test more sensitive to the historic value of the subject securities than the bondholders acknowledge. As we said in Shores, a securities fraud plaintiff must argue not "that he bought bonds, but that the bonds he bought were fraudulently marketed." Id. at 471. Finkel succinctly characterized this test:

> The majority in Shores simply recognized that a Rule 10b-5 action based on the fraud on the market theory could embrace a claim for fraud that resulted in the issuance of worthless securities as well as a fraud that inflated the price of a security.

817 F.2d at 364 (footnote omitted).

Here, the bondholders' argument fails because the Westside bonds always had a legitimate value in the bond market. Indeed, these bonds remained near market value for several years after Westside disclosed the accurate version of its beginning and several months after this lawsuit commenced.

Moreover, we perceive strong policy reasons to reject the bondholders' contentions. The plaintiffs' position would attenuate the fraud-on-the-market presumption of reliance far beyond its proper bounds and almost entirely extinguish reliance as a legitimate element of a rule 10b-5 claim. This presumption assumes that investors ordinarily and correctly rely upon the "market price" of a security as an accurate estimate of the future value of

that security. Accordingly, if a defendant distorts the market price by lying or concealing the truth, the fraudulently distorted price can deceive even prudent investors.

This theory, however, implicitly assumes that there is an active, efficient secondary market capable of accurately measuring the present and future value of a security. Moreover, the theory supposes that most investors seek out securities whose prices the market accurately reflects.

Where, as here, investors seek out underpriced securities that are traded outside efficient secondary markets, the fraud-on-the-market theory of reliance no longer makes sense. Investors can no longer be said to have relied upon an established market price, which, if it

exists at all, reflects an inherently unstable and probably inaccurate estimate of the security's actual value. Moreover, Abell has never argued - indeed, the evidence belies such an argument - that Westside bonds ever lacked any value. Given the inherently imprecise means available to measure the actual value of Westside bonds at any given point in time, Abell's argument that the members of the plaintiff class presumably relied upon the market price for those bonds is unconvincing.

Consequently, we reject bondholders' arguments and hold that the fraud-on-the-market presumption of reliance is available only (1) where the subject securities were traded actively in large markets, or (2) where the promoters knew that the subject enterprise was worthless

when the securities were issued, and successfully issued the securities only because of defendants' fraudulent scheme. Since the Westside bonds fail to meet either test, and since the Ute presumption is here unavailable, plaintiffs have failed to establish reliance for the class, and the class's rule 10b-5 claim must fail.

2. Reliance of Some Individual Members of the Class

Two of the individual plaintiffs, Abell and Walton, testified that they did in fact rely upon the defendants' misrepresentations. Walton testified that he considered the attractive interest rate which the bonds bore, a Swink flyer that had not been authorized by WLJ and the advice of Dick Hardwick, a Swink broker. Abell testified that he

relied upon the attractive interest rate, Hardwick's reputation as a broker, the fact that Westside bonds were Louisiana municipal bonds, and Fryar's promise to invest $2,000,000 of his own case in Westside. We conclude that this testimony, which was uncontradicted at trial, is enough to establish that Abell and Walton relied upon Fryar's misrepresentations. We do not, however, think that it is sufficient to prove that Abell and Walton relied upon anything which WLJ said or did.

WLJ never had any direct contract with Westside's bondholders. Consequently, the bondholders may not assert that WLJ misrepresented or failed to disclose any material facts directly to the bondholders. Instead, WLJ limited its role in the Westside bond-offering to

the legal work it did for the bond underwriters. Consequently, WLJ never made any statements on its own behalf directly to the bondholders, but only checked and revised the statements made in the offering statement.

Neither Abell nor Walton testified that he relied upon that statement. Instead, their own testimony indicates that they relied only upon the attractiveness of the offer, Fryar's misrepresentation as to his own investment in Westside, and Swink's misguided (or fraudulent) assessment of the bonds' value. Neither Swink, which knew more about the bonds than it cared to reveal in the offering statement, nor Abell and Walton, who did not seem to care what the offering statement actually said, can be said to have relied upon the

offering statement itself.

Consequently, none of the plaintiffs has proved that he relied upon WLJ's legal opinion, however good or bad that opinion may have been. From our foregoing analysis, we conclude that Abell and Walton have shown that Fryar and the underwriters, but no WLJ, have violated rule 10b-5 and are liable to Abell and Walton for damages.

Thus, Abell and Walton (but not the class) have shown that Fryar misrepresented material facts, that they relied upon these misrepresentations in choosing to buy Westside bonds, and that Westside's actual financial structure eventually caused Abell's and Walton's losses. Abell and Walton did not prove, however, that anyone ever relied upon anything WLJ did, said, or wrote. Thus,

they have not proven that WLJ violated rule 10b-5 directly. Our analysis, however, does not suggest that WLJ is not vicariously liable for the role of the underwriters played in executing Fryar's fraud.[17] We next analyze that theory.

D. WLJ's Potential Vicarious Liability

The bondholders suggest that, under two separate theories, WLJ is vicariously liable for Fryar's and the underwriters' fraud. The plaintiffs assert first that WLJ had a special duty, as underwriters' counsel, to the investing public to ferret out and disclose publicly any fraud. Second, according to the bondholders, WLJ rendered substantial

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[17] WLJ does not argue that, at most, only Fryar committed fraud. Since WLJ does not challenge the jury's finding that the underwriters participated in the fraud, we accept the jury's verdict.

assistance to the fraudulent scheme despite the unmistakable sings that fraud was afoot. By turning a blind eye to these signs, the bondholders argue, WLJ subjected itself to rule 10b-5 liability for aiding and abetting securities fraud. We examine each of these arguments in turn.

1. Duty to Disclose

The bondholders argue that WLJ implicitly guaranteed the accuracy of the offering statement to the investing public. According to the bondholders, WLJ impliedly assumed a duty to correct all material misrepresentations in the offering statement when it agreed to assume the responsibilities of an underwriter's counsel. Thus, the bondholders conclude, WLJ issued deficient legal opinions, subjecting it

to liability, because it failed to discovery and disclose Fryar's fraud.

The bondholders derived this proposition of law from four well-established practices of the securities bar. First, underwriter's counsel, acting on behalf of the underwriter, traditionally prepares the offering statement. Second, underwriter's counsel assumes a due-diligence duty to ensure that the offering statement is correct in all material respects. Third, this due-diligence duty derives from the fraud provisions of the securities laws, which themselves exist primarily to protect innocent investors. Fourth, Westside's offering statement listed WLJ as underwriter's counsel - a fact that suggests to the plaintiffs that WLJ implicitly took public responsibility for

the legal sufficiency of the offering statement itself.

We cannot agree with the bondholders' argument. Traditionally, lawyers are accountable only to their clients for the sufficiency of their legal opinion. It is well understood in the legal community that any significant increase in attorney liability to third parties could have a dramatic effect upon our entire system of legal ethics.[18]. An

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[18] See, e.g., First Mun. Leasing Corp. v. Blankenship, Postts, Aikman, Haigin & Stewart, 648 S.W.2d 410, 413 (Tex. App, 5 Dist. 1983, writ ref'd n.r.e) (refusing to extend attorney malpractice claims to third parties not in privity with the defendant lawyer); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986) ("[L]awyers ... are [not] required to tattle on their clients in the absence of some duty to disclose. To the contrary, attorneys have privileges not to disclose"

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attorney required by law to disclose "material facts" to third parties might thus breach his or her duty, required by good ethical standards, to keep attorney-client confidences. Similarly, an attorney required to declare publicly his or her legal opinion of a client's actions and statements may find it impossible to remain as loyal to the client as legal ethics properly require.[19]

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(citations omitted).); Goodman v. Kennedy, 18 Ca.3d 335, 134 Cal.Rptr. 375, 556 P2d 737, 743 (Cal. 1976) (if attorneys were liable to both clients and other parties to arms-length transactions, attorneys would become self-protective and could not fulfill counseling role).

[19] See Barker; Page v. Frazier, 388 Mass. 55, 445 N.E.2d 148, 153 (1983) (absent separate attorney-client relationship, lawyer owes no duty of reasonable care to adverse party

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Cognizant of these risks, the law, as a general rule, only rarely allows third parties to maintain a cause of action against lawyers for the insufficiency of their legal opinions. In general, the law recognizes such suits only if the non-client plaintiff can prove that the attorney prepared specific legal documents that represent explicitly the legal opinion of the attorney preparing them, for the benefit of the plaintiff.[20] Goodman, 556 P.2d at 743; Bush, 519 F.Supp. at 596.

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because of attorney's conflicting duty to client); Bush v. Rewald, 619 F.Supp. 585 (D.Haw.1985) (lawyer owed no duty to investors buying from organization where organization, not investors, was attorney's client).

[20] This rule, which a growing number of states have adopted for imposing

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In practice, this rule has meant that an attorney is rarely liable to any third party for his or her legal work unless the attorney has prepared a signed "opinion" letter designed for the use of a third party. Compare S.E.C. v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973) (plaintiff may state rule 10b-5

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liability for negligently-rendered opinions, reflects the increasing influence of Restatement (Second) of Torts §552 (1977). That section provides:

Information Negligently Supplied for the Guidance of Others

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable

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action against attorney who signed an opinion letter another had declined to sign) with Keene Corp v. Weber, 394 F.Supp. 787 (S.D.N.Y. 1975) (attorney not liable under rule 10b-5 because no misleading opinion letter at issue).

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care or competence in obtaining or communicating the information.
(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

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The bondholder plaintiffs argue that other courts have established less restrictive tests to determine whether securities lawyers are liable to those who invest in securities the lawyers' clients have issued or underwritten. The three most relevant are Spectrum; Cronin v. Midwestern Dev. Auth., 619 F.2d 856, 862 (10th Cir. 1980); and In re Flight

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(Continued from previous page) Section 552, however, has not affected legal malpractice law as much as that provision has impacted other areas of malpractice law. A majority of states still require privity between legal malpractice plaintiffs and defendants. See generally Annotation, What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client, 61 A.L.R. 4th 464 (1988); Annotation, Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties, 61, A.L.R. 4th 615 (1988). See also First Mun. Leasing Corp, 648 S.W.2d at 413.

Transp. Corp. Sec. Litig., 593 F.Supp. 612, 617-18 (D.Minn 1984).

In Spectrum, however, the Second Circuit held a lawyer liable under rule 10b-5 because he signed a critical opinion letter which another lawyer, who escaped liability, had refused to sign. Accrod, Keene Corp. (describing the holding of Spectrum). In Cronin, the Tenth Circuit suggested that courts could impose rule 10b-5 liability upon bond counsel, who ordinarily does issue an opinion letter that comes attached to the offering statement or prospectus.

Of the three cases, only Flight Transp. Corp. squarely departs from the traditional rule to impose rule 10b-5 liability upon all underwriter's counsel. Flight Trans. Corp. however, has no precedential value here, and we find its

reasoning unconvincing.[21] Since we can find no binding authority creating a special rule in the field of securities law, [22] we decline to depart from either rule or practice here.

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[21] The bondholders cite numerous other cases to support their position, but most are easily distinguishable. Several impose liability upon lawyers who issued opinion letters. E.G., Morgan v. Prudential Group, Inc., 527 F.Supp. 957 (S.D.N.Y. 1981), aff'd, 729 F.2d 1443 (2d Cir. 1983). Others involved lawyers who stepped out of their professional legal roles and actively promoted the securities (e.g., S.E.C. v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1095 (2d Cir. 1972)), or attorneys who were sued by their own clients (e.g., DCD Programs Ltd. v. Leighton, 833 F.2d 183, 190 (9th Cir. 1987)). The remaining cases are district court cases with little precedential weight here.

[22] We have failed also to find any authority requiring us to follow the general rule here. WLJ cites us to Dirks v. S.E.C., 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983), and Chiarella v. United States, 445

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Plaintiffs presented almost no evidence that WLJ's due diligence duties existed to benefit or protect the investing public at large. Rather, bondholders provided only that WLJ had a duty to its clients to ensure that they complied with securities laws. The mere fact that these laws were designed to

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(Continued from previous page) U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980), but we find these cases inapposite here. Both Chiarella and Dirks analyzed cases in which the S.E.C. charged the defendants with having breached a specialized, pre-existing duty to disclose certain facts. In these cases, the S.E.C.'s claims rested upon whether the defendants had a duty to speak when they preferred to remain completely silent. Here, by contrast, the plaintiffs have alleged that WLJ, by its actions, adopted the false statements and distortions made by its clients. The claimed duty here, then is not a duty to speak rather than remain silent, but a duty to correct false statements and distortions rather than acquiesce in them.

protect the investing public does not convince us that WLJ assumed more than the duty to protect its own clients from legal liability. "The securities laws do not impose liability for ordinary malpractice, even though that malpractice may diminish the value of the issuer and thus of the issuer's securities." Barker, 797 F.2d at 496.

Nor do we believe that WLJ assumed any duties to these bondholders merely by allowing its name to be included in the final offering statement. We think it more significant that WLJ never signed the offering statement itself or any of the documents included in that statement. Moreover, the offering statement says only that WLJ passed on legal issued for the underwriters, its clients. By contrast, the offering statement does not

limit for whom the bond counsel had prepared his opinion. If any of the attorneys or law firms assumed legal responsibility for the sufficient of the offering statement, it was bond counsel William Skye, who actually did sign a letter disclosing his own legal opinion regarding several aspects of the bond offering.

We join the Seventh Circuit, which, in Barker, id. at 497, commented:

> We express no opinion on whether the [attorneys] did what they should [or] whether there was malpractice under state law.... We are satisfied, however, that an award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards in the legal and accounting professions. Liability depends on an existing duty to disclose.... The plaintiffs have not pointed to any rule imposing on [attorneys] a duty to blow the whistle. [Emphasis in original.]

Accordingly, WLJ owed no duty of

disclosure to the bondholders.

2. Aiding and Abetting

Finally, the bondholders argue that even if WLJ did not itself commit securities fraud, it nonetheless aided and abetted Fryar and Swink in their scheme to commit securities fraud. As the plaintiffs correctly note, our cases impose section 10b-5 liability upon those who are securities fraud. Woodward v. Metro bank, 522 F.2d 84 (5th Cir. 1975).

We have recently restated the Woodward test to determine who is subject to section 10b-5 aiding-and-abetting liability: (1) There must have been a securities violation by the primary party; (2) the aider and abettor must have had a "general awareness" of its role in a rule 10b-5 violation; and (3) the aider and abettor must have knowingly

rendered "substantial assistance" in the rule 10b-5 violation. Bane v. Sigmundr Exploration Corp., 848 F.2d 579, 581 (5th Cir. 1988).

We have already held that substantial evidence supports the jury verdict that Fryar and the underwriters committed securities fraud. Moreover, WLJ does not challenge the bondholders' implicit assertion that it substantially assisted the underwriters in effecting their scheme. Thus, it remains only to determine whether WLJ was "generally aware" of its role in furthering the fraudulent scheme, and whether its assistance was "knowing."

In Woodward, we explained what these scienter requirements mean. "General awareness", we said, means knowledge which, though it may be adduced from

reckless conduct, means actual awareness. 522 F.2d at 96. We also held that how "knowing" an abettor must be depends upon how substantial the abettor's assistance is:

> When it is impossible to find any duty of disclosure, an alleged aider-abettor should be found liable only if scienter of the high 'conscious intent' variety can be proved. Where some special duty of disclosure exists, then liability should be possible with a lesser degree of scienter.... In a case combining silence/inaction with affirmative assistance, the degree of knowledge required should depend on how ordinary the assisting activity is in the business involved. If the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find 10b-5 liability without clear proof of intent to violate the securities law. Conversely, if the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability. In any case, the assistance must be substantial before liability can be imposed under 10b-5.

Id. at 97 (citations and footnotes omitted).

Woodward appears to divide scienter into two parts: knowledge of one's role in a fraud, and commitment (or intent) to aid in the fraud's success. Scienter, then, would require first that the alleged abettor know of the fraud's existence and generally understand how its actions aid in promoting the success of the fraud. The second element of scienter - commitment - would be met where evidence shows that the abettor acts from a desire to help the fraud succeed.

> Naturally, whether the plaintiff needs evidence independent of the abettor's actions to prove commitment depends upon the nature of the defendant - abettor's assistance. Silent acquiescence never indicates by itself that the abettor wants the fraudulent scheme to succeed; here, we usually require proof of "conscious intent." Id.

Even when an abettor takes positive actions that aid a nefarious plan, the abettor does not always approve of the scheme's success. Thus, "we would be loathe to find 10b-5 liability without clear proof of intent to violate the securities laws" where the assistance amounts to "no more than transactions constituting the daily grist of the mill...." Id. On the other hand, those who go out of their way to aid a fraud are generally the most willing and committed to its success.

If this view of Woodward is correct, then it would harmonize the law of rule 10b-5 aiding an abetting with its roots

in the criminal law.[23] However, both the commentators and our sister circuits view the scienter requirement as a single rule that determines both one's level of awareness and "knowing and substantial assistance" according to the same rule. See e.g., IIt, an Int'l Inv. Trust v. Cornfeld, 519 F.2d 909, 923 (2d Cir. 1980) (Friendly, J.) Under this generally-accepted view, Woodward

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[23] The federal criminal aiding and abetting statute requires that the alleged abettor share in the criminal intent of the principal and engage in affirmative conduct designed to aid the venture. United States v. Ortiz-Loya, 777 F.2d 973,

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establishes a single test for scienter that varies as the level of assistance decreases on a sliding scale from recklessness to "conscious intent." Under either rule, however, we

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(Continued from previous page) 980 (5th Cir. 1985). Accord, United States v. Weddell, 800 F.2d 1404, 1408 (5th Cir.), modified, 804 F.2d 1343 (5th Cir. 1986). "Thus, to sustain a conviction, the evidence and reasonable inference therefrom must show [the defendant] knew that a fraud was occurring, that he associated himself with that fraud, that he participated in it with a desire that it be accomplished, and that he committed some overt act designed to make it a success." United States v. Westbo, 746 F.2d 1022, 1025 (5th Cir. 1984).

must determine whether the alchemy of WJL's level of assistance, combined with its level of knowledge of the unfolding fraud, supports a jury verdict against WLJ. Here, we think it does not.

We review the evidence, as we must, in the light most favorable to the plaintiff bondholders. They established that WLJ knew that one of its clients (Hancock) was under SEC investigation for securities violations. The evidence also permitted the jury to conclude that WLJ knew that the FBI, the SEC, and the National Association of Securities Dealers were also investigating Hancock. Additionally, WLJ was aware that both the original underwriter's counsel and the original bond counsel had resigned from their representations - a further sign that something might be amiss.

Nonetheless, WLJ did little to investigate what its client had done previously or why the original counsel had resigned. Moreover, WLJ readily made several material changes to the final offering statement without asking its clients (who requested the changes) why they should be made. Finally (and again), according to the evidence most favorable to plaintiffs), WLJ failed to investigate properly the truth of the offering statement despite its duty to its clients to do so.[24]

We conclude that this evidence is not strong enough to sustain the jury's verdict as to WLJ. First, in examining what WLJ did to assist in the fraud, we

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[24]. We re-emphasize that WLJ's duty ran to its clients, not to the bondholders.

determine that WLJ provided only legal services that "[constitute] the daily grist of the mill" of a law firm with a substantial securities practice, Woodward, 522 F.2d at 97. Consequently, Woodward requires "clear proof of intent to violate the securities laws." Id. But at best, the evidence shows only that WLJ recklessly disregarded its duties to its clients. WLJ ignored several warning signs that the jury could have found aroused the law firm to suspect the propriety of the offering.

Aroused suspicions, however, do not constitute actual awareness of one's role in a fraudulent scheme. Moreover, to prove plainly that an alleged abettor intended to violate the securities laws, plaintiffs must prove more than that the abettor recklessly ignored danger

signals.[25] Consequently, we conclude that the jury's verdict holding WLJ liable for securities fraud was not supported by the evidence, and we overturn that verdict.

IV. RICO

The bond holders also claim that Fryar and All American violated the provisions of the Racketeering Influenced and Corrupt Organizations Act ("RICO").[26]

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25. We note that this analysis is the same whether we characterize "clear proof of intent" as the proof necessary to establish commitment.

26. 18 U.S.C. §§ 1961-1968. The portions of RICO that are relevant to this appeal are:

§ 1961. Definitions
As used in [RICO]-
(1) "racketeering activity" means...
(B) any act which is indictable under any of the following provisions of title 18, United States Code:...
section 1341 (relating to mail fraud),
section 1343 (relating to wire

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Specifically, they repeated the allegation that Fryar committed securities fraud and also charged these defendants with mail fraud and wire fraud. The jury believed the bondholders

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fraud),... or (D) any offense involving...fraud in the sale of securities....

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

§ 1962. Prohibited activities
(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2 title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in

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and found that Fryar's racketeering activity had caused $850,000 damage to the bondholders. The trial judge, who apparently assumed that these damages did

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acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase to do amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a patter of racketeering activity or through collection of an unlawful debt to acquire or maintain directly or

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not duplicate the securities damages, any enterprise which is engaged in, or trebled the jury's figure and awarded the plaintiffs $2,550,000 on their RICO

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indirectly, any interest in or control of the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1964. Civil remedies...
(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the

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claims.[27] Fryar attacks this judgment on three grounds.

First, Fryar asserts that plaintiffs failed to prove any compensable damages. Title 18 U.S.C. § 1964(c) authorizes "[a]ny person injured in his business or property" to sue based upon the injurious RICO violations. Fryar argues that the evidence did not establish (1) any injury to plaintiffs' business or property or (2) any causal connection between the plaintiffs' putative injuries and Fryar's misrepresentations.

We disagree. Plaintiffs proved, to the jury's satisfaction, that the

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(Continued from previous page) damages he sustains and the cost of the suit, including a reasonable attorney's fee.

27. The court was required under 18 U.S.C. § 1964(c) to treble the bondholders' damages. See supra n. 26.

Supreme Court, U.S.
FILED
MAR 10 1992
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1992, TERM

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MAR 10 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOE E. FRYAR,

PETITIONER

VERSUS

EDWARD C. ABELL, JR., AND CAREY WALTON, ET AL,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Volume II

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Petitioner

Westside project was less feasible than Fryar had presented, and that Fryar misrepresented key facets of Westside's financial structure. Most significantly, Fryar withheld the details of his land transaction with All American, of All American;'s huge profit when it resold the same land to Westside, and of his $2 million pledge, of which money none came from his own pocket.

The bondholders also developed substantial evidence to support the jury·s conclusion that Westside's rickety financial structure, long hidden by Fryar's financial tricks, caused its ultimate bankruptcy. In that bankruptcy, the court reduced the bond's interest rate by nearly one-third. This is a sufficient showing that Fryar's alleged

RICO violations injured the bondholders' property.

Fryar also contends that RICO requires plaintiffs to prove at least two related predicate acts arising from distinct schemes. See 18 U.S.C. § 1962 (requiring a RICO plaintiff to prove a "pattern of racketeering"). Fryar's brief correctly notes that "[p]laintiffs have fashioned their RICO claim from the matrix of their securities law fraud claims." From this observation, Fryar concludes that the plaintiffs failed to prove the predicate acts necessary to establish a "pattern of racketeering."

Our cases, however, belie Fryar's legal analysis. In R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985), we held that RICO requires only that the predicate acts alleged be

related, not that they arise from separate schemes or incidents. Here, plaintiffs have alleged over half a dozen acts of mail fraud and wire fraud, each of which stems from Westside's bond offer. R.A.G.S. requires no more. But see Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 426 (5th Cir. 1987); Crocker v. F.D.I.C., 826 F.2d 347, 348 n. 2 (5th Cir. 1987), cert. denied, __ U.S. __, 108 S.Ct. 1075, 99 L.Ed.2d 235 (1988); Smith v. Ayers, 845 F.2d 1360, 1365-66 n. 18 (5th Cir. 1988). (Each of these cases criticizes R.A.G.S., but notes that only the court sitting en banc or the Supreme Court may overturn R.A.G.S.)[28]

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28. We recently granted a petition for a re-hearing en banc to address this issue Smith v. Cooper/T.Smith Corp., 850 F.2d 1086 (5th Cir. 1988) (vacating panel op. at 846 F.2d 325 (5th Cir. 1988)).

Finally, Fryar argues that plaintiffs failed to prove any of their wire fraud or mail fraud allegations. Fryar reasons that mail fraud and wire fraud, which he assumes incorporate all the elements of fraud, must require plaintiffs to prove materiality and reliance. He asserts that the plaintiffs have failed to establish these two elements.

Materiality and reliance, however, are not elements of either wire fraud or mail fraud. Our cases unmistakably hold that plaintiffs need prove only a defendants' fraudulent intent; the success of a fraudulent scheme is not necessary to establish mail fraud or wire fraud. To prove mail fraud, for example, a plaintiff must prove that

> (1) the defendant participated in some scheme or artifice to defraud, (2) the defendant or someone

> associated with the scheme used the mails or 'caused' the mails to be used, and (3) the use of the mails was for the purpose of executing the scheme.

Armco Indus. Credit Corp. v. SLT Warehouse Co., 782 F.2d 475, 481-82 (5th Cir. 1986) (citing United States v. Davis, 752 F.2d 963, 970 (5th Cir. 1985)). A "scheme to defraud" is one "in which artifice or deceit is employed to obtain something of value...." United States v. Kreimer, 609 F.2d 126, 128 (5th Cir. 1980). Thus, plaintiffs prove that Fryar intended to defraud them where they can show that defendant's plan was "reasonably calculated to deceive persons of ordinary prudence and comprehension." United States v. Finney, 714 F.2d 420, 423 (5th Cir. 1983).[29] Under RICO, each

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29. See also United States v. Toney, 605 F.2d 200, 205 (5th Cir. 1979), cert.

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use of the mails to accomplish the same scheme is a separate predicate act. See R.A.G.S.

Here, plaintiffs alleged that Fryar had repeatedly used the mails to execute a scheme to sell Westside bonds with the intent of defrauding the purchasers. The record amply supports the jury's conclusion that Fryar, intending to defraud potential investors, devised and employed a scheme to sell Westside bonds. Fryar knowingly misled prospective bondholders about a land transaction that significantly affected Westside's financial structure. He falsely

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denied, 444 U.S. 1090, 100 S.Ct. 1055, 62 L.Ed.2d 779 (1980); United States v. Netterville, 553 F.2d 903, 909 (5th Cir. 1977), cert. denied, 434 U.S. 861, 98 S.Ct. 189, 54 L.Ed.2d 135 (1977) and 434 U.S. 1009, 98 S.Ct. 719, 54 L.Ed.2d 752 (1978).

suggested that he had backed the health care project with $2,000,000 of his own money. Obviously, the jury could find that Fryar had a reasonably calculated plan to deceive persons of ordinary prudence and comprehension into giving Westside their money.

Nor does Fryar contest whether he used the mails repeatedly to execute this scheme; indeed, the evidence is overwhelming that he did. Fryar used the mails to obtain and transmit the application forms for Westside's certificate of need; to help create All American and interpose it in the transaction; and to send the land transaction documents to All American. He also caused others to use the mails to transmit the sales circulars that erroneously portrayed Fryar as purchasing and pledging

$2,000,000 of mails to be used in an attempt to cover up the fraud and deceive bondholders into believing All American was performing more obligations that what it had actually undertaken.[30] Thus, the evidence strongly supports the jury's RICO verdict.

V. State Law Claims.

The bondholders also urge various state grounds for imposing substantive liability upon Fryar and WLJ. They allege that defendants violated the Louisiana Blue Sky Law (LBSL) (La.R.S.

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30. We have stated that a person "need only have had a reasonable basis to foresee that his actions would result in the use of the mails" to be convicted of mail fraud. United States v. Georgalis, 631 F.2d 1199, 1206 (5th Cir. Unit B 1980). Here, Fryar had a reasonable basis to foresee that the underwriters and brokers would use the mails to sell the bonds and reassure the investors once the bonds were sold.

51:701 et seq.), negligently misrepresented and/or fraudulently misrepresented material facts (La.Civ.Code arts. 2315, 1953), committed fraud (La.Civ.Code art. 1953), and aided and abetted others in violating the law (La.Civ.Code art. 2324). The bondholders also claim that WLJ breached a fiduciary duty to them and committed legal malpractice. We now consider the merits of these claims.

A. Louisiana Blue Sky Law.

For exactly the same reasons that the defendants are not "sellers" under section 12, they are not "sellers" within the meaning of the LBSL. The LBSL was modeled after the federal Securities Act. Caldwell v. Trans-Gulf Petroleum Corp.,

322 So.2d 171, 174 (La.1975). The relevant language of the LBSL is virtually identical to the language of section 12.[31] Although there are no

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31. The relevant language of the LBSL, as it existed throughout the period relevant to this appeal, reads:

> § 715 [of Title 51]. Civil liabilities
>
> A. Any person who...offers or sells a security in violation of [the LBSL]...is liable to the person buying the security from him....
>
> B. Every person who directly or indirectly controls a seller liable under Subsection (A), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar

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Louisiana cases discussing "seller" status under the LBSL, in the absence of Louisiana authority, its state Louisiana courts interpret the LBSL in accordance with federal precedents. Ed v. Nationwide Candy Division, Ltd., 403 So.2d 780, 785 (La.App.3d Cir.), writ

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functions, every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller....

Neither WLJ nor Fryar was a controlling person, a broker-dealer, agent selling the bonds, or a partner, officer, or director of any organization that might be considered a "seller." Thus, § 715(B) does not apply to this case.

denied, 407 So.2d 732 (La.1981).[32] Accordingly, the logic of the Supreme Court's Pinter decision is fully applicable to the LBSL.

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32. Cf.Landry v. All Am. Assur. Co., 688 F.2d 381 (5th Cir. 1982) (applying federal tolling doctrine to LBSL in the absence of contrary Louisiana authority); Huddleston v. Herman & MacLean, 640 F.2d 534, 551 & n. 27 (5th Cir. Unit A Mar. 1981), rev'd in part on other grounds, 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) (applying federal case law defining "seller" under the federal Securities Act to Texas blue sky statute in the absence of contrary Texas authority). Both the plaintiffs and WLJ have stated in briefs that the determination of "seller" status under the LBSL should be the same as the determination of "seller" status under § 12.

B. Negligent Misrepresentation; Fraudulent Misrepresentation.

The bond holder of plaintiffs assert several Louisiana claims based upon misrepresentation. Each of the misrepresentation claims plaintiffs allege - negligent misrepresentation and fraudulent misrepresentation - requires the plaintiffs to prove reliance.[33]

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33. Negligent misrepresentation, according to Louisiana jurisprudence, is encompassed within the broad language of articles 2315 and 2316 of the Louisiana Civil Code. Devore v. Hobart Mfg. Co., 367 So.2d 836, 839 (La.1979). To prevail on a claim of negligent misrepresentation, the plaintiff must show that the defendant owed a legal duty to him to provide correct information, a breach of that duty, and resultant injury to the plaintiff. Beal v. Lomas & Nettleton Co., 410 So.2d 2d 318, 321 (La.App. 4th Cir. 1982); Josephs v. Austin, 420 So.2d 1181, 1185 (La.App. 5th Cir. 1982), writ denied, 427 So.2d 870 (La.1983). In analyzing claims of negligent misrepresentation, Louisiana courts have referred to the

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Under Louisiana law, reliance means actual reliance. La Croix v. Recknagel, 230 La. 842, 89 So.2d 363, 367 (La.1956); Luquette v. Floyd, 147 So.2d 894, 899 (La.App. 1962), writ denied, 244 La. 119, 150 So.2d 585 (1963).

Here, the class has completely failed to prove that most of its individual members actually subjectively relied upon

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Restatement Second of Torts. Dousson v. S. Cent. Bell, 429 So.2d 466, 468 (La.App. 4th Cir.), writ not considered, 437 So.2d 1135 (La.1983). See also Silver v. Nelson, 610 F.Supp. 505, 521 (E.D.La.1985).

Specifically, Louisiana courts have adopted the definition of negligent misrepresentation set forth in the Restatement (Second) of Torts § 552, which states,

(1) One who, in the course of his business, profession or employment or in any other transaction in which he has a pecuniary interest, supplies false information for the

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any misrepresentations. Only Abell and Walton established that they relied upon anything Fryar represented to be true, and neither of these two plaintiffs showed that he relied at all upon WLJ.

Moreover, the trial court ruled that any damages awarded under these claims would duplicate damages awarded under rule 10b-5. Since we agree and have held

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> guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. [Emphasis added.]
>
> In general, the elements of a claim of fraudulent misrepresentation or fraud may be stated as follows: (1) a misrepresentation of a material fact, (2) made with the intent to deceive, and (3) causing justifiable reliance with resultant injury. See La.Civ.Code arts. 1847, 2315; see also Silver v. Nelson.

already that Fryar is liable to Abell and Walton for violating rule 10b-5, we defer further discussion of these claims to our discussion of the appropriate damages.

C. Legal Malpractice

As we describe above, the law traditionally has allowed only clients or former clients to state malpractice claims against attorneys. Here, we see this principle applied: The bondholders seek to hold WLJ liable to them for malpractice in the work WLJ prepared for the underwriters. Under Louisiana law, the bondholders ordinarily may maintain such an action only where the lawyer prepares an opinion for the benefit of the non-client plaintiff and knows the third party will rely upon that opinion.[34]

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34. Non-clients may also sue attorneys, who are the agents of their clients,

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This test for attorney liability to non-clients was developed first in Capital Bank & Trust Co. v. Core, 343 So.2d 284 (1st La.App.), writ denied, 345 So.2d 61 (La.) and 345 So.2d 504 (La. 1977). Core, an attorney, issued Capital a title opinion covering the property described in the collateral mortgage, knowing that Capital would rely thereon in making the loan to Core's client and also knowing the loan would not be made unless his client owned the mortgaged property in full ownership and free of

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for actions that exceed the scope of authority given by the clients. Sondes v. Sears, Roebuck & Co., 501 So.2d 829 (4th La.App. 1986). Such actions follow the law regarding third-party complaints against agents who exceed their authority. Since the bondholders do not allege that WLJ overstepped its bounds as an agent for the underwriters, we need not consider such a complaint here.

all encumbrances except the collateral mortgage to Capital. Core's title opinion certified his examination of title and stated date and hour as of which time Core found the mortgaged property was owned by his client free of all encumbrances save the collateral mortgage to Capital.

Notwithstanding Core's title opinion, the mortgaged property was burdened with severe defects and encumbrances. Despite Core's knowledge that these statements were false, "he consciously and deliberately certified the truth and accuracy of his opinion." 343 So.2d at 289.

The appellate court held the attorney liable to the bank, reasoning that where an attorney furnishes a title opinion to a non-client knowing the third party

would rely upon the opinion, the attorney is liable to the third party. Id. at 288. Significantly, the court grounded its decision in the codal provision that establishes liability for a stipulation pour autrui pursuant to which one may bind himself for the benefit of a third party. In such cases, privity of contract results, and the agreement becomes acceptance. Id; La.Civ.Code art. 1890.

Another Louisiana appellate court has held that attorney liability to third parties does not extend beyond the Capital Bank rule. In Clause v. Manuel, 442 So.2d 905 (3d La.App. 1983), writ denied, 448 So.2d 106 (La.1984), the court refused to hold a land purchaser's attorney liable to the vendor for the negligent title opinion the attorney

prepared. The purchaser bought the property after his attorney issued a title opinion assuring the purchaser (and his financing bank) that the title was clear. Two and one-half years after the transaction, the purchaser discovered a tax lien the vendor had failed to pay. The purchaser sued the vendor, who then brought a third-party complaint against the attorney. The vendor, claiming she would have insisted on a higher price had she known of the encumbrance, sought indemnification from the lawyer.

The court affirmed summary judgment on the third-party complaint. It noted that the vendor had never retained the attorney, and that the lawyer did not advise her. As the Clause court wrote, "To render [the attorney] liable..., we would have to find that his title exam-

ination and title opinion were rendered for the benefit of [the vendor]." 442 So.2d at 908.

We emphasize that this rule, which we consider eminently sound, does not reduce attorneys' responsibility for their work, but merely prevents attorneys from dividing their loyalties between clients and non-clients. More recent cases reveal that Louisiana courts are concerned acutely about the ethical problems of confidentiality and loyalty that are exposed when the law requires attorneys to reveal information to non-clients.

The Louisiana Supreme Court recently ruled that a client does not have a malpractice claim against its own attorney for failing to reveal confidential information unless the client explicitly orders the disclosure.

Rayne State Bank & Trust Co. v. Nat. Union Fire Ins. Co., 483 So.2d 987, 992 (La.1986). The importance of preserving client confidences is even more vividly highlighted in Scaccia v. Lowe, 445 So.2d 1324 (La.App. 4 Cir. 1984). There, the court refused to hold attorneys for a divorced woman liable for her former husband when they refused to tell him where she had hidden his minor child.

These cases underscore how basic attorney-client confidence and loyalty is to the American justice system. To protect those values, Louisiana allows third-party suits only if the attorney prepares an opinion for the non-client on which he knows the non-client will rely. Thus, the attorneys, who are always responsible to their clients and to the bar and the courts for their professional

actions, may control when they assume a duty to third parties for their legal opinions.

This rule is identical to the one we formulate today to govern the liability of underwriter's counsel to investors who purchase the underwritten securities. We hold that the bondholders have failed to state a malpractice claim against WLJ.

D. Fiduciary Duty.

The bondholders also assert that WLJ breached a fiduciary duty it owed to them. We cannot find any Louisiana statute or case upon which plaintiffs base their claim, and they refer use to none. We assume, therefore, that their claim is grounded in the general delictual principles of Civil Code articles 2315 and 2316 and of the Restatement (Second) of Torts. In

particular, section 552 of the Restatement provides in relevant part:

> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

We hold that the Restatement provision, assuming it is part of Louisiana law, does not apply here. Bondholders do not suggest any public duty which WLJ has violated. As we have shown, WLJ had no attorney-client relationship with any of the bondholders and did not issue a signed legal opinion to the plaintiffs. Moreover, we cannot find any specific duty to the public which the securities laws impose upon attorneys. "Neither lawyers nor accountants are required to tattle on their clients in

the absence of some duty to disclose. To the contrary, attorneys have privileges not to disclose." Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 497 (7th Cir. 1986) (citations omitted). Consequently, WLJ had no fiduciary duty to breach.

E. Aiding and Abetting.

At the time Westside offered its bonds to the public, Louisiana had a single statute that provided the basis for most vicarious or inchoate liability under Louisiana law. In 1982, that statute, Article 2324 of the Louisiana Civil Code, read in relevant part:

> He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with

> that person, for the damage caused by such act.[35]

The bondholders argue that WLJ is liable under this section for having aided Swink (and Fryar) in defrauding the investors who bought up Westside's bond offering.

In deciding this issue, as in deciding whether to impose rule 10b-5 liability upon someone who helps another to violate that rule, we focus primarily upon the element of scienter. Article 2324 does not specify the answer to this question, but several cases have analyzed it.

Equilease Corp. v. Smith Int'l, Inc., 588 F.2d 919 (5th Cir. 1979), is the leading case in our circuit discussing what level of scienter satisfies article 2324. There, a middleman who bought drill pipe for oil explorers found itself

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35. Louisiana has since amended article 2324 (in 1987), and it no longer contains this language.

threatened with bankruptcy. The middleman's primary creditor was the drill pipe manufacturer who had sold it. The middleman conspired with a financing company to defraud one of the financer's clients, a venture capitalist, of funds the middleman desperately needed to remain afloat. To that end, the middleman and financer forged several of the manufacturer's documents, including pipe invoices, to convince the venture capitalist that the middleman owned more assets than he actually did. The venture capitalist, relying upon the forged documents, loaned the middleman the needed funds.

At the same time, the manufacturer began pressing the middleman hard to make good on some late payments. Worried that the manufacturer would put it in default,

the middleman called the financer, who had possession of the venture capitalist's checks, and ordered the financer to expedite its paperwork. In its rush, the financier sent the manufacturer a suspiciously large check, and accidently included one of the forged invoices.

The manufacturer thought the size of the check peculiar, but did not catch the forgery in the invoice until after it had cashed the check. Once it did catch the forgery, it called the financer, whom the manufacturer thought had originated the new loan to the middleman. (The venture capitalist wished its efforts to remain anonymous, and thus allowed the financer to take all public actions for the venture capitalist.) Naturally, the financer, whose part in the fraud the

manufacturer had no reason to suspect, reassured the puzzled manufacturer that all was well. The manufacturer did nothing else, and the venture capitalist did not discover the fraud itself until the bankrupt middleman was no longer able to return the purloined money.

In Equilease, the plaintiff venture capitalist argued that the defendant manufacturer, who had no knowledge of the fraud it purportedly had assisted, was liable under a theory of negligence. The venture capitalist suggested two theories to support the proposition that a negligent defendant could be liable for assisting in fraud, which requires knowledge. First, according to the venture capitalist, Louisiana employs a theory of "negligent ignorance" that requires someone who should suspect fraud

to investigate and act to thwart the fraud. We agreed with the venture capitalist that

> [i]n certain situations Louisiana courts have recognized the common law principle, often styling it 'negligent ignorance', that knowledge of the results of a proper investigation can be imputed to a person who has actual knowledge of elemental facts, yet fails to inquire into their significance.

Id. at 926.

Nonetheless, we reviewed the confused case law of Louisiana and concluded that Louisiana utilizes this tort theory primarily in real property title suits. In such cases, land investors who should have suspected title defects, but failed to investigate, were estopped where the rightful owners sued to regain title. We declined to extend the doctrine of

"negligent ignorance" to hold negligent abettors liable for fraud:

> Knowledge is imputed in these [real property] cases to estop the defendant from taking inequitable advantage of a predicament caused by his own failure to investigate. We are not concerned here with preventing the defendant from obtaining an unfair advantage of his own but with imposing a further obligation on the defendant to compensate the victim of fraud for the loss he sustained. Moreover, the predicament of the plaintiff was not caused by the direct action of the defendant since he was not originally a party to the fraudulent transaction. Rather, the defendant's relationship to the plaintiff arises only from the fact that he may have been able to prevent the predicament had he investigated the possibility that he was assisting a fraud.

Ids. at 927-28 (footnote omitted).

We then turned to the venture capitalist's theory that an abettor, like a joint tortfeasor, may be held liable under Louisiana law for negligently assisting and intentionally inflicting harm. We held:

> Logically, a party may be held individually liable for negligence whether the damage caused to the plaintiff takes the form of fraud or bodily injury. And we perceive no impediment to binding a defendant who acts negligently in solido with those who commit an intentional tort when the same harm to the plaintiff results, provided, of course, that each party is legally at fault.

Id. at 929 (footnotes omitted).

The bondholders argue that Equilease applies here. We agree, but hold WLJ not liable. To be "legally at fault," one must owe a duty to the person harmed. In Equilease, we held that the manufacturer

had no knowledge of the venture capitalist's existence and no concrete evidence of unlawful activity in light of the financer's assurances. We concluded that the manufacturer owed the venture capitalist no further duty to investigate. Similarly, we have already held that WLJ owed no duty to the bondholders to disclose client confidences which WLJ had a duty to keep.[36]

We come to the same conclusion when we examine the single relevant Louisiana case decided since Equilease. In Summers

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36. Bank of New Orleans & Trust Company v. Monco Agency, Inc., 823 F.2d 888 (5th Cir. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 1019, 98 L.Ed.2d 984 (1988), is inapposite because that case only reversed a summary judgment in favor of accountants which had held a bank's claim to be time barred. The issue of accountant's duties to nonclient third parties (such as the bank) was not raised or decided by that appeal.

Brothers v. Brewer, 420 So.2d 197 (1st La.App. 1982), the perpetrator of a fraudulent scheme to raise funds for a non-existent business succeeded because he had forged a maintenance contract an obtained unauthorized stock in another company. Both documents impressed the business men he had targeted for the fraud, and convinced them that the non-existent business was real. The maintenance contract was notarized by an attorney who did not witness anyone signing the document, and thus did not know it had been forged. Similarly, the schemer got the "issuing" company's attorney, who knew the perpetrator was a felon, to sign the unauthorized stock certificates.

The appellate court held that article 2324 did not impose liability upon either

lawyer. The Court determined that the attorneys' actions

> were independent acts, with the fraudulent scheme ...already set in motion before [the lawyers] participated in the fraud. Furthermore, some of the damages caused to plaintiffs by [the attorneys] were not the natural and foreseeable consequences of the earlier fraudulent acts of [the perpetrator], but were rather the result of particular wrongdoing or fault on the part of [the lawyers]....

420 So.2d at 204. Thus, where the assistance rendered is comprised of actions that do not involve the abettor directly in the fraud, article 2324 does not apply. This conclusion is reinforced if the assistance itself creates a harm unique and independent from any harm foreseeable from the original fraud.

Summers Brothers appears to vitiate

Equilease's teaching that a negligent tortfeasor may be independently liable for another's fraud where the negligence is independent of the fraud and compounds the fraud's harm. However, negligent tortfeasors whose acts are not independent of the fraud still must owe a duty to those whom the fraud harms; otherwise, the fraud victims may not prevail against the negligent actor. Here, WLJ owes no such duty.

VI. Damages

Both sides also raise a variety of damages issues touching on virtually every aspect of the lawsuit. We turn now to the damages findings of thing jury and the damages awarded by the court.[37]

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37. Since we decide all liability issues favorably to WLJ, the damage issues apply now only to Fryar. Of course, certain of the arguments as to damages were presented by WLJ.

A. Rule 10b-5 Damages.

The jury found that the plaintiffs suffered $9,549,000 in lost Westside bond interest payments because of defendants' fraud,[38] but refused to award plaintiffs any out-of-pocket damages. The jury also found that the Cheneyville land transaction land transaction, in which All American received $2,000,000 worth of Westside bonds that later entitled it to substantial interest payments, unjustly increased All American's wealth by $2,950,000. The defendants attack this award on two grounds, and the plaintiffs attack it on one ground of their own.

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38. Since the jury found that the defendants who had already settled were 30% responsible for the securities fraud, the court awarded only 70% of $9,554,000 (or $6,715,800) against the defendants who stood trial.

First, the defendants argue that the evidence of damages which the plaintiffs presented was too vague and flawed to support any specific damages award. Since we have overturned the judgment in favor of the class as a whole, these damages must be redetermined, in any event.

Second, and more fundamentally, the defendants contend that rule 10b-5 plaintiffs may collect only out-of-pocket damages, which the jury found the plaintiffs had not suffered. Defendants also argue that plaintiffs are entitled to only one award under rule 10b-5,[39] and

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39. Section 28(a) of the Exchange Act, upon which defendants rely in arguing that the plaintiffs received an impermissible double recovery, reads in relevant part:

> The rights and remedies provided by this chapter shall be in addition to

(Continued on following page)

that the award for lost interest should be affirmed only to the extent it exceeds the $2,950,000 windfall profit which All American must repay to the bondholders.

Before we consider this challenge, however, we will examine Abell and Walton's response. They counterattack the jury's determination that the plaintiffs suffered no out-of-pocket damages, claiming that the evidence does not support such a verdict.

(Continued from previous page)

> any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.

15 U.S.C. § 78bb(a).

We do not agree with plaintiffs that the jury should have found that the bondholders suffered some out-of-pocket damages. Such out-of-pocket damages, the traditional measure of damages in a rule 10b-5 action, are "the difference between the real value of [the securities at issue] and the amount paid by the plaintiffs at the time of purchase." James v. Meinke, 778 F.2d 200, 205 (5th Cir. 1985) (emphasis added.) Here, measured at the time of purchase, the jury could find that the bondholders paid only what the bonds were worth. The market price for Westside bonds did not fluctuate much in the first few years after Westside issued them. Even after Westside revealed, in a letter dated January 20, 1983, the information that

previously had been withheld, prices for Westside bonds remained stable.

Indeed, plaintiffs did not sustain any actual losses until Westside defaulted on an interest payment in October 1984, more than three months after filing this suit. After that default, the bonds temporarily lost much of their face value, but rebounded to about par value after the bankruptcy court allowed Westside to reduce the interest rate which each of the bonds bore. Consequently, few of the Westside bondholders lost any money out of their own pockets, and none who paid the face value of the bonds at any time before October 1984 paid more than the bonds were worth.

Defendants aggressively contend that rule 10b-5 awards damages only for out-of-pocket losses. They argue that we

adopted this rule in Huddleston. As defendants note, Huddleston observed that "the out-of-pocket rule...is the traditional measure of damages in a rule 10b-5 action...." 640F.2d at 555. We noted that out-of-pocket losses, properly calculated, measure how much the defendants' fraud inflates the value of the subject securities. The out-of-pocket thus distinguishes between losses caused by defendants' fraud and losses caused otherwise (e.g., by market forces). Id. Consequently, this rule ordinarily is the correct measure of rule 10b-5 damages.

"The ultimate question, however, is how much damages did the defendants' fraudulent misstatement or omission cause each individual plaintiff?" Id. at 554. The Supreme Court has approvingly noted

that various other measures of damages can be used in section 10b-5 cases where out-of-pocket damages provide an inadequate measure. Randall v. Loftsgaarden, 478 U.S. 647, 663, 106 S.Ct. 3143, 3153, 92 L.Ed.2d 525 (1986). Since Huddleston, we have applied yard-sticks other than the out-of-pocket measurement where appropriate. See James v. Meinke (imposing consequential damages where jury found no out-of-pocket damages).

In this instance, the plaintiffs argue, the out-of-pocket rule does not accurately measure their losses. Here, the initial value of the possessory interest in the bonds was equal to the par value of those bonds; the bond-holders did not suffer any losses until Westside went bankrupt and eventually re-

organized. With reorganization, the interest rates which the bonds bore dropped to about two-thirds of the original rates. The decrease in the interest rates naturally reduced the value of the possessory interest from what it would have been otherwise.[40]

Since the fraudulently-concealed details of the Westside land transaction and Fryar's shaky guarantee to support Westside financially caused Westside's bankruptcy, the defendants' fraud caused the bondholders to sustain two types of

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40. The defendants, noting that the bonds still trade close to par value, argue that the bondholders' possessory interest did not shrink because of Westside's bankruptcy. This argument, however, misses the mark; Westside bonds presumably would be trading at significantly above par value had Westside continued to pay the original interest rates.

property loss: the loss of a reasonably certain, legally guaranteed stream of income, and the resulting loss of some of the resale value of the bonds. The former is not a loss which the out-of-pocket rule can measure.

We agree with bondholders, therefore, that rule 10b-5 may compensate them for the loss of a contracted right to a guaranteed stream of income. The right to receive a specified stream of income is a property right distinguishable from possessory interests in the bonds themselves. The possessory interest allows the purchaser to hold or dispose of the bonds as the purchaser sees fit and entitles the holder to enjoy any subsidiary interests, including the right to receive any income stream which the

bond pays, that have not been alienated from the possessory interest itself.

The right to receive income-stream payments (or, in the case of bonds, interest payments) is a distinct interest that is subsidiary to the purchaser's possessory interest. As a landowner may sever subordinate mineral rights, so may a bondholder sever the distinct right to income payments (the coupons) from the bond itself.[41] Consequently, an investor purchasing a bond acquires at least two separate property interests vulnerable to the destructive fraud of another.

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41. The classic example of a bondholder who alienates the interest payments from the possessory interest is one who sets up a trust arrangement (assuming the cestui has a legal right to the interest payments as well as an equitable right).

Were we to adopt the defendants' position that only out-of-pocket damages are available, we would effectively limit rule 10b-5 plaintiffs to damages to their possessory interests only - the price paid for the security minus its real value at the time of purchase. Thus, plaintiffs would be unable to collect all the actual damages which the fraud ultimately causes.

Here, since the plaintiffs also acquired a right to future interest payments, the damage award must reflect the interest payments plaintiffs lost because of defendants' fraud. Since the fraud, like a cancer, began its destructive course from the time of purchase, we measure the damage to the right to an income stream according to a formula similar to our out-of-pocket

damage calculation: Plaintiffs are entitled to the difference, discounted to present value at the time of purchase, between the stream of income as represented and the income stream remaining after the fraud has worked its course.

Unfortunately, the expert who calculated and explained to the jury the interest payments which the bondholders had lost discounted the value of those payments to their present value at the time of trial. These calculations, which were the only damages figures upon which the jury could base its verdict, must be recomputed to determine their present value at the time the bonds were purchased. We therefore remand for the district court to recalculate Abell's and Walton's lost interest payments.

On remand, we instruct the district court not to recompute how the lost interest payments reduced the bondholders' possessory interest. We measure the damage done to possessory interest by the out-of-pocket rule only. Since the jury found no out-of-pocket damages, the plaintiffs are not entitled to any compensation for lost value.[42]

The defendants forcefully urge us to instruct the district court to reduce the rule 10b-5 award by the amount of interest income which the bondholders earned before Westside defaulted on interest payments. The defendants note

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42. In fact, the expert proved only that the fraud reduced the value of the bonds to par value. Consequently, the fraud only reduced the profit which investors could have made from Westside bonds; it did not reduce the bonds' value to less than what the bondholders paid for them.

that the Supreme Court, in Randall, held that rule 10b-5 damages awards ordinarily should reflect the actual damages which the plaintiffs incur. Since the income a bondholder receives from a bond reduces that bondholder's actual damages, income should be deducted from the damage award. The defendants claim that the interest payments here are such income, relying upon cases requiring courts to reduce damages by the dividend income earned on subject securities.

We conclude, however, that Randall is inapposite. Here, plaintiffs claim injury to their right to receive specified contractually-set interest payments. They had an established property right to receive an invariable stream of income at specified moments

over a pre-determined contractual period.[43] Plaintiffs claimed, and proved, that Fryar, All American, and other fraudulently undermined their rights to future interest payments. It hardly makes sense, in determining what amount of damages will make plaintiffs whole again, to reduce the award by the interest payments which plaintiffs received in the past. Such a result would "make whole" only those plaintiffs who agreed to forsake part of what defendants had destroyed.

Nor do we think that our rule today conflicts with existing law. Randall, for instance, recognized that courts must

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43. That the terms of any given bond might differ dramatically from the terms of any other bond is of no consequence, since the terms of each bond were unambiguously established.

reduce section 12 damages awards by the income which a section 12 plaintiff receives from owning the subject security. In this case, where we must decide what damages will compensate a rule 10b-5 plaintiff, Randall directs us to determine the "actual damages" which the plaintiff has incurred. Were we considering the damage done to plaintiffs' possessory interest in the bonds, we would have to offset any award by the income which that possessory interest had reaped for its owners. Here, however, the property interest damaged was a right to receive a specific stream of income; offsetting such a damage award by income received under the bond agreements makes little sense.

The defendants make one final attack upon the damage award. They argue that

if the plaintiffs collect both the $2,950,000 All American must pay for unjust enrichment and all of plaintiffs' lost interest income, the plaintiffs will receive an unjust double recovery. We agree, and direct the district court on remand to award only the lost interest that exceeds what All American must pay for unjust enrichment.

Section 28(a) of the Exchange Act limits rule 10b-5 plaintiffs to actual damages. Randall, 478 U.S. at 662. Rule 10b-5 exists primarily to compensate victims and secondarily to deter securities defrauders; as long as the award necessary to compensate victims is enough deter wrongdoers, we would not award additional deterrent damages. We award such deterrent damages, including damages for unjust enrichment, only when

compensatory damages allow the wrongdoers to profit from their fraud. Of course, when we award deterrent damages, they always exceed or equal compensatory damages, and thus it is not necessary to award additional, duplicative "compensatory" damages.

Succinctly put, section 28(a)'s actual-damage rule ordinarily requires us to award plaintiffs only what they actually lost. But "where the defendant received more than the [plaintiffs'] actual loss...damages are the amount of the defendant's profit." Affiliated Ute, 406 U.S. at 155, 92 S.Ct. at 1473. In any event, we never award plaintiffs both their actual loss and defendant's unjust enrichment, because that would amount to an impermissible double recovery. "[T]he accepted rationale underlying this

alternative is simply that '[i]t is more appropriate to give the defrauded party the benefit even of windfalls than to let the fraudulent party keep them.'" Randall, 478 U.S. at 663, 106 S.Ct. at 3153 (emphasis added) (quoting Janigan v. Taylor, 334 F.2d 781, 786 (1st Cir.), cert. denied, 382 U.S. 879, 86 S.Ct. 163, 15 L.Ed.2d 120 (1965)).

B. RICO Damages.

1. Sufficiency of the Evidence.

Fryar argues that the RICO damages assessed against him and All American (1) should be overturned because Fryar and All American did nothing to harm the bondholders' business and property interests, or, alternatively, (2) should be reduced by one-third, because the compensatory portion of the RICO award duplicates the securities-fraud damages.

We reject Fryar's first argument because, as we have already shown, Fryar and All American's securities fraud substantially harmed the plaintiffs' right to future interest payments. As Fryar himself concedes, the plaintiffs base their securities fraud claim upon the same factual allegations as those supporting their mail-fraud RICO claims against Fryar. Since reliance is not an element of the class's RICO claims, it follows that the proof of its damages which the class presented suffices to show that Fryar and All American caused measurable RICO damages against the class members.

Fryar contends that the plaintiffs presented only flawed and inadequate evidence to quantify their damages. The crux of Fryar's argument is that the

expert testimony which the plaintiffs used to establish damages was based upon faulty assumptions and questionable data. The data consisted of questionnaires, some not completed, which some of the Westside bondholders had answered. The bondholders who returned their questionnaires included people who were not members of the plaintiff class and people who did not buy their bonds from any defendants named in plaintiff's complaint.

Fryar also attacks the expert's calculations based upon this data: Fryar argues that the expert failed to adjust his calculations to account for class members who had sold their bonds, for bondholders who had bought Westside bonds after Westside's bankruptcy, and for the interest income the bondholders earned

before Westside went bankrupt. Finally, Fryar argues that the jury verdict does not reduce the plaintiffs' damages to reflect causes other than fraud that contributed to plaintiffs' lost interest income.

We reject Fryar's arguments. Albert Derbes, the plaintiffs' damages expert, calculated that the class had lost $8,616,973 in future interest payments discounted to present value at the time of trial.[44] Derbes explained that accounting experts such as himself customarily rely upon questionnaires, similar to the one which Fryar attacks, to compute such lost interest payments.

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44. Plaintiffs also introduced evidence that after Westside defaulted on its interest payments in October 1984, the class lost, as of the date of trial, an additional $3,402,146.60 in past-due interest payments.

Second, the class does not include persons who purchased Westside bonds after it defaulted on its interest payments, and thus Derbes's calculations (of the class's losses) do not include such bondholders. Neither do we do agree that the jury verdict fails to reduce the award to account for other causes that contributed to plaintiff's losses. Since the jury awarded plaintiffs considerably less than the damages which they proved at trial, we assume the jury adequately accounted for any additional causes of plaintiffs' damages.

2. Duplication of RICO and Securities Damages.

The defendants argue that the potential securities fraud award under rule 10b-5 should be reduced by the RICO award against Fryar and All American.

They contend that RICO is primarily remedial, and that its treble damages should be considered compensatory relief and thus subject to the single-recovery rule. In defendants' view, we should apply section 28 of the Exchange Act to reduce rule 10b-5 damages to account for the compensation which the plaintiffs obtain under RICO.[45]

We are not directed, however, to any of our cases that address the nature of Rico in this regard. After conducting our own search of applicable authorities, we have concluded that none of our sister circuits has considered this question either. We acknowledge that several district courts have expounded learnedly

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45. Of course, in light of our exoneration of WLJ on liability, this damages issue now can affect recovery only against Fryar.

on how to characterize RICO damages,[46] but there are no extant opinions that bind us today. We write, therefore, on an essentially clean slate.

At least a portion of the RICO damages should be deemed remedial. Civil damages under RICO are available only to those persons "injured in [their] business or property by reason of a [RICO] violation..." 18 U.S.C. § 1964(c). Congress directed the courts that RICO as a whole "shall be liberally construed to effectuate its remedial purposes."

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46. Compare State Farm Fire & Cas. Co. v. Estate of Caton, 540 F.Supp. 673, 680 (N.D. Ind.1982); In re Nat'l Mortg. Equity Corp. Mortg. Pool Certificates Sec. Litig., 636 F.Supp. 1138 (C.D. Cal. 1986) (holding that all RICO damages are compensatory) with Summers v. FDIC, 592 F.Supp. 1240 (W.D. Okla.1984) (holding that the trebled portion of RICO damages is penal).

84 Stat. 947, 18 U.S.C. § 1961 note.

Here, whatever portion of RICO relief is remedial duplicates the damages awarded under rule 10b-5. The evidence fails to show that the defendants caused any harm to plaintiffs' business or property other than to reduce their interest income from Westside bonds. As we have already discussed, the individual plaintiffs are entitled to recover from All American all the unjust enrichment which All American gained from Westside. Thus, we must adjust Abell's and Walton's damage claims. Since All American's gains (valued by the jury at $2,950,000) exceed the RICO damages ($2,550,000), the only question is: How much of the RICO award is compensatory and thus duplicative of rule 10b-5 relief?

The answer to this question turns on the nature of treble damages under RICO. Congress provided, in 18 U.S.C. § 1964(c), that RICO plaintiffs are entitled to treble proven damages and a reasonable attorneys' fee. We must determine whether the trebling feature of section 1964(c) damages is penal or remedial. If remedial, treble damages are entirely compensatory, and the rule 10b-5 award must be reduced by the entire amount of the RICO award attributable to Abell and Walton. If RICO's trebling formula is penal, then only one-third of the RICO damages are compensatory, and the securities fraud damages are to be reduced by one-third of Abell's and Walton's RICO recoveries.

Courts faced with the task of determining whether a statute is penal in

nature need not venture upon uncharted seas, for the standard of analysis has been defined since the case of Huntington v. Attrill, 146 U.S. 657, 668-69, 13 S.Ct. 224, 228, 36 L.Ed. 1123 (1892):

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackston: 'Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors.' [Emphasis in original.]

On the basis of the Supreme Court's opinion and its progeny, the Sixth Circuit in Murphy v. Household Fin. Corp., 560 F.2d 206, 209 (6th Cir.1977), distilled three factors to be used in determining whether the statute is penal: (1) whether the purpose of the statue is to redress individual wrongs or more general wrongs to the public; (2) whether the recovery under the statute runs to the harmed individual or to the public; and (3) whether the recovery authorized by the statute is wholly disproportionate to the harm suffered.

We have never adopted the Sixth Circuit test, but have instead accepted it as a useful tool in interpreting Huntington. Cf. First Nat'l Bank & Trust Co. v. Flatau, 643 F.2d 1988, 191 (5th

Cir. 1980). In that vein, we note the following passage from Huntington:

> In the municipal law of England and American, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws. [Citations omitted.] But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered.

146 U.S. at 666-67, 13 S.Ct. at 227 (emphasis added) (as quoted in First Nat'l Bank & Trust Co. v. Flatau, 643 F.2d at 190).

We hold that the portion of RICO damages in excess of actual damages is penal. Those added damages are "not

limited to the damages suffered"; they seem more designed to deter than to compensate. As Congress constructed them, the civil provisions of RICO compensate primarily victims of fraud or fraudulent schemes. Had Congress merely wanted to make whole this new class of plaintiffs, it would have limited civil RICO damages to the actual damages commonly available to fraud victims.

However, in promulgating RICO, Congress expressly found that the problem of racketeering was primarily public, not private, including draining resources from the economy, subverting the democratic process, and undermining the general welfare. 84 Stat. 922-23 (1970) (findings and purpose of the Organized Crime Control Act of 1970, Title IV of which is RICO). See also Summers, 592

F.Supp. at 1242. We conclude, therefore, that Congress trebled RICO damages as part of this overall attack on the public wrongs of organized crime.[47]

C. Attorneys' Fees.

The district court, after an extensive hearing, awarded $2,567,323.30 in attorneys' fees. In spite of the

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47. Our result would be the same had we applied the Murphy three-pronged test. First, although the purpose of § 1964(c) is to redress both public and private wrongs, the trebling component of that provision appears to be aimed primarily at remedying public wrongs. Second, recovery under § 1964(c) obviously runs to the individual, a factor suggesting the statute is not penal. But finally, the authorized penalty is plainly disproportionate to the individual harm redressed, since it is trebled. See Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639, 101 S.Ct. 2061, 2066, 68 L.Ed.2d 500 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers.").

"American rule" that attorneys' fees shall be awarded as a matter of course only when a specific statute so authorizes, the court failed to indicate the basis for its decision. The defendants challenge this award.

WLJ contends that it is not substantively liable for violating any statute upon which the court may have based attorneys' fees. Since we have absolved WLJ of all liability, we agree and reverse the district court's judgment insofar as it holds WLJ and its insurer (Valley Forge) liable for attorneys' fees.

Fryar also argues that the district court should have assessed only those attorneys' fees necessary to develop the claims for which attorneys' fees may be awarded. He notes, correctly, that

attorneys' fees are not available as a matter of course under rule 10b-5. Huddleston, 640 F.2d at 559. Fryar argues that work done on the securities claims, under which plaintiffs may not receive attorneys' fees, undoubtedly consumed most of the legal resources which the plaintiffs spent on this case. Consequently, Fryar's position, should we adopt it as our own, would dramatically reduce the attorneys' fees to which plaintiffs are entitled.

We note first that Fryar's argument presents a case of first impression. Of the statutes upon which the plaintiffs based their claims, only RICO and the Louisiana fraud statutes allow a court to award attorneys' fees as a matter of right. We have not been directed to any cases interpreting these statutes in

regard to the attorneys' fees issue presented here.

We choose to adhere to a rule slightly different from the one which Fryar proposes. We think it best to apply the rule we have fashioned for awarding attorneys' fees in other areas of the law. Where plaintiffs base several claims, derived "from related legal theories," upon "a common core of facts," we allow attorneys' fees for the work done on all such related claims. Hernandez v. Hill Country Telephone Coop., Inc., 849 F.2d 139, 144 (5th Cir. 1988) (citing Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983)); Espino v. Besteiro, 708 F.2d 1002, 1007-10 (5th Cir. 1983). As Fryar himself concedes, the RICO claims arise "from the matrix of"

plaintiffs' securities claims. All of the state-law claims which plaintiffs assert against Fryar also arise from the same transactions that underlie plaintiffs' RICO and securities claims against Fryar.

Nonetheless, we cannot simply affirm the district court's award, for that court awarded attorneys' fees against all the defendant who stood trial. Thus, the court awarded attorneys' fees for all of the legal work necessary to develop and try plaintiffs' case. Plaintiffs developed much of their case, however, to obtain a verdict against WLJ. Several of plaintiffs' legal theories and arguments applied only to WLJ; indeed, at least one of their claims (for legal malpractice) implicates only WLJ. Consequently, the district court must readjust the

attorneys' fees award to compensate plaintiffs only for the legal resources which they expended to develop a case against Fryar and All American. For this purpose, we will remand.

D. Judicial Interest.

To all of these awards, the district court added twelve percent per annum judicial interest calculated from the date of judicial demand. The defendants claim that they should not have to pay this interest, totaling about $1,000,000, on these awards because they are already paying damages equal to the interest rate which the bonds bear. The plaintiffs counter that the district court properly imposed judicial interest upon the lost interest damages, since the district court awarded lost interest to the plaintiff class to compensate plaintiffs

for the loss of the use of money that rightfully belonged to them.

The plaintiffs are correct. We add that the lost interest payments, which would have been due on virtually all the bonds until at least 1998, have already been discounted to present value. These damages do not represent the face value of the interest payments as they would have continued to come due, but the resale value, at a specific point in the past, of the right to receive those payments in the future. Consequently, the damages awarded for lost interest reflect losses which the plaintiffs have already sustained, but losses they will sustain in the future. The district court properly applied judicial interest.

VII. Valley Forge's Appeal.

Valley Forge, WLJ's malpractice insurer, has also appealed this case on a coverage question. The court tried Valley Forge along with All American, Fryar, and WLJ, and after trial adjudged Valley Forge liable in solido for all the awards against WLJ. Those awards exposed Valley Forge to potential liability exceeding $9,000,000. Valley Forge argues on appeal that WLJ's policy limits are $5,000,000, not the $10,000,000 the district court found.

We do not reach this argument. We merely note that Valley Forge is liable only to the extent WLJ is. Since we have reversed every basis for imposing liability upon WLJ, we now vacate the district court's judgment to the extent it imposes liability upon Valley Forge,

and we dismiss Valley Forge's appeal.

VIII. Jury Tampering

To summarize what we have held thus far: WLJ and Valley Forge are not liable under any legal theories of this case. Fryar, as a matter of law, is not liable under section 12 of the Securities Act or the LBSL, or to the plaintiff class for violating rule 10b-5 or any other state-law claims based upon misrepresentation. The evidence sufficiently supports Abell's and Walton's individual rule 10b-5 and state-law misrepresentation claims against Fryar, but the damages for those claims must be recalculated, because damages were determined for the entire class and not just Abell and Walton. Sufficient evidence also supports the jury verdict holding Fryar liable to the

class for violating RICO, but the damage award must be reduced by one-third to avoid double recovery. Sufficient evidence, more-over, supports all of the damage awards. Finally, the district court properly awarded attorneys' fees against Fryar and All American but improperly against WLJ and Valley Forge.

We review all these holdings at this stage in the opinion to remind the reader which are issues of law and which ones are based merely upon the sufficiency of the evidence. The importance of that distinction will soon become apparent, as we now turn to allegations that Fryar prejudiced the jury against himself by trying to bribe one of its members.

A. The Relevant Procedural Facts

A little over a month into the trial, the judge received information

from the FBI that Fryar was attempting to bribe several members of the jury. The FBI continued to investigate this allegation, but it had probable cause to believe that Fryar had targeted and contacted jurors Terracina and Teer. The judge questioned an FBI agent extensively in camera, outside the presence of the defendants and their attorneys, and satisfied itself that probable cause existed to believe that Fryar indeed had attempted to bribe Terracina and Teer.

The judge sealed the record of this in camera hearing, and kept the information to himself until the last day of trial. On that day, he called the attorneys into his chambers, informed them that he had probable cause to believe that someone was tampering with jurors Terracina and Teer, and told them

that he would excuse those jurors without giving any specific explanations to the jury. In open court, the judge excused Terracina and Teer from the jury, reducing the size of the jury to the six jurors who would deliberate the case.

After several hours of deliberation, the jury returned its verdict against the defendants. Immediately afterwards, the trial judge examined each of the jurors individually, outside the presence of the other jurors but in the presence of all the attorneys. Each of the jurors claimed to have heard nothing about the bribery attempt, and each swore that nothing had affected his or her decision. After this voir dire, the judge released the jurors to the custody of the FBI and the marshals so that these law enforcement authorities could continue

their jury-tampering investigation.

In the course of this police investigation, the FBI determined that most of the jurors actually knew about Fryar's attempt to bribe Terracina. When the court found out that the jurors had lied about their knowledge of Fryar's bribery attempts, it conducted a second voir dire, also in the presence of the attorneys.

In this second voir dire, the court determined that the jurors had decided collectively not to admit their knowledge of the bribery attempts. Each juror testified the second time that he or she had lied th first time because he or she did not consider the bribery stories that Terracina told to be the truth, and each juror wanted to avoid even the possibility of a mistrial, because the

jurors did not want their efforts to go for naught.

Terracina was viewed universally by his co-jurors as an unstable, unpredictable individual. Consequently, none of the jurors believed Terracina when he informed them that Fryar had offered him $10,000 to vote for Fryar. Some of the jurors discussed Terracina's story among themselves, and came to the same conclusion.

None of the jurors, however, had heard anything about any attempts to bribe Teer, a much more respected member of the panel. The jurors testified that they had been disappointed, and somewhat surprised, when the judge excused Terracina and Teer.

Most of the jurors testified that they had assumed that the last two jurors

chosen were alternates and would be the ones to be excused at the end of the trial. Since neither Terracina nor Teer was among the last two jurors chosen, several of the jurors immediately began to speculate as to why those jurors had been excused. A few admitted that they began to wonder whether there was any truth to the stores which Terracina had been telling them. Indeed, it was shortly after Terracina and Teer were excused that the jurors discussed what to do if asked about Terracina's story, and it was then that the jurors decided that they would lie.

Nonetheless, each of the jurors continued to insist that he or she still did not believe Terracina's story. Moreover, each juror insisted that what he or she knew about Fryar's attempts to

bribe Terracina had nothing to do with his or her own personal decisions in deliberating the case.

The trial judge chose to believe the jurors' testimony that they had not been prejudiced. Additionally, the trial judge noted that he considered the verdict to be an imminently fair and reasonable one that showed not signs of prejudice. Nevertheless, Fryar asks us to grant him a new trial.

B. The Law.

The constitution, through the due process clause of the fifth amendment and the right to a jury trial enshrined in the sixth and seventh amendments, requires federal courts to give every defendant a fair trial. Haley v. Blue Ridge Transfer Co., 802 F.2d 1532 (4th Cir. 1986). It has been written in even

the most ancient authorities that the constitution guards against even the appearance that prejudice has infected a jury. See Budoff v. Holiday Inns, Inc., 732 F.2d 1523 (6th Cir. 1984) (describing nineteenth-century cases).

Until recently, courts generally agreed that any extrajudicial contact or material reaching the jury presumptively prejudices it. See Haley; United States v. Butler, 822 F.2d 1191 (D.C. Cir. 1987). Under Remme v. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954) the party supporting the jury's verdict carried a heavy burden to disprove jury prejudice.[48] See Haley; Butler; United States v. Forrest, 620

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[48] In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror

(Continued on next page)

F.2d 446 (5th Cir. 1980). However, the Supreme Court cast a foreboding shadow on these assumptions when it decided Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

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during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 229, 74 S.Ct. at 451 (citations omitted). We have long held that "the integrity of the jury system is no less to be desired in civil cases." United States v. Harry Barfield Co., 359 F.2d 120, 124 (5th Cir. 1966). See also Haley; Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985); Butler.

There, the Court reversed the Second Circuit's judgment granting a writ of habeas corpus to a New York inmate convicted of murder. Shortly after the state murder trial began, one of the jurors applied to the prosecutor's office for a job in a newly-formed investigative department. The prosecutor himself did not know about the juror's job application until several days into the trial, and thought it too insignificant to tell the judge when he did find out. When the trial judge was informed, he held a hearing to determine whether th juror's contact with the prosecutor's office had biased the juror against the defendant. After hearing testimony from the prosecutor and Smith, the trial judge found "'no evidence' suggesting [the juror bore] 'a sinister or dishonest

motive'"[49] or had been prejudiced.

The defendant, now convicted, eventually petitioned the district court for a writ of habeas corpus. The court granted the writ. 485 F.Supp. 1365 (S.D.N.Y.), aff'd, 632 F.2d 1019 (2d Cir. 1980). Both the district court and the court of appeals held that the trial court should have conclusively presumed prejudice from the facts. 455 U.S. at 214, 102 S.Ct. 16 944.

The Supreme Court reversed, holding that due process requires only that the trial court hold a Remmer hearing to determine whether the juror has been

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[49] 455 U.S. at 214, 102 S.Ct. at 944 (quoting from the trial court's findings in People v. Phillips, 87 Misc.2d 613, 618-19, 384 N.Y.S.2d 906, 910 (1975)).

prejudiced. Citing Remmer, the court wrote,

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

Id. at 215, 102 S.Ct. at 945. Later, the Court added that

> ... due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Where that rule, few trial would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in Remmer and held in this case.

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Id., at 217, 102 S.Ct. at 946 (footnote omitted).

The bondholders argue that Smith v. Phillips overruled Remmer's heavy presumption of juror prejudice. According to the bondholders, Smith v. Phillips requires the party challenging the jury verdict to prove prejudice. Defendants respond that Smith v. Phillips is distinguishable, primarily because it was a habeas challenge to a state trial, not a direct appeal.

Several of our sister circuits already have considered this question squarely. In United States v. Pennell, 737 F.2d 521 (5th Cir. 1984), cert. denied, 469 U.S. 1158, 105 S.Ct. 906, 83 L.Ed.2d 921 (1985), the court concluded that the Remmer presumption had been overrule. There, five jurors received

anonymous, early-morning calls instructing them to convict a criminal defendant. The Sixth Circuit refused to order a new trial because the district judge had held a hearing an determined that the defendant had not proved prejudice.

Pennell, however, has not been accepted in any other circuit, and three circuits have explicitly rejected the argument that the challenging party must prove prejudice.[50] Other cases, while not facing the question directly, have continued to apply the Remmer presumption

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[50] See United States v. Littlefield, 752 F.2d 1429, 1431-32 (9th Cir. 1985) (criticizing Pennell); Haley, 802 F.2d at 1535 (distinguishing Phillips); Butler, 822 F.2d at 1195-96 n. 2 (rejecting Pennell and concluding that "Remmer's allocation of the burden remains the law").

despite Smith v. Phillips.[51] We have applied the Remmer presumption since Smith v. Phillips; however, we have not yet explicitly determined how Smith v. Phillips has affected Remmer. See United States v. Webster, 750 F.2d 307, 336-39 (5th Cir. 1984), cert. denied, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 856 (1985). Webster does not explicitly take account of Smith v. Phillips. Moreover, it specifies that where outside influence on the jury is alleged, "a presumption of prejudice arises," and it is incumbent

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[51] See, e.g., Owen v. Duckworth, 727 F.2d 543 (7th Cir. 1984); United States v. Delaney, 732 F.2d 639, 543 (8th Cir. 1984); United States v. Hines, 595 F.2d 722, 730-31 (10th Cir. 1982); Hobson v. Wilson, 737 F.2d 1, 47-49 (D.C. Cir. 1984), cert. denied, 470 U.S. 1084, 105 S.ct. 1843, 85 L.Ed.2d 142 (1985) (civil case).

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upon the government to rebut that presumption at a hearing. 750 F.2d at 338.

We do not find this dictum in Webster to be controlling here. It is not evident that the panel was cognizant of the new standard, suggested in Smith v. Phillips, that no longer assumes jury prejudice. Further, Webster noted that "we do not find it necessary to decide if a presumption of prejudice should be applied in all cases of this nature." Id. at 339.

More importantly, and irrespective of the question of who must carry the burden, it is evident here that the trial court properly conducted a hearing, with jurors, that satisfies the requirements of both Smith v. Phillips and Webster. Smith v. Phillips requires

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a "hearing in which the defendant has the opportunity to prove actual bias." 455 U.S. at 215, 102 S.Ct. at 945. Quoting Remmer, 347 U.S. at 230, 74 S.Ct. at 451, the Court noted that at the hearing, the trial judge should "'determine the circumstances, the impact thereof upon the juror, and whether or not [they were] prejudicial, in a hearing with all interested parties permitted to participate.'" 455 U.S. at 216, 102 S.Ct. at 945 (emphasis added in Smith v. Phillips). In Webster, the panel noted specifically that "[c]ounsel should be present at any hearing held to assess outside influence on the jury." 750 F.2d at 338 (citing United States v. Forrest, 620 F.2d 446 (5th Cir. 1980)).

In the case which we now review, the district judge amply met these

requirements, examining the jurors[52] separately in two special post-verdict hearings at which all counsel were present. After carefully considering all of the facts available to him, and examining the demeanor of the jurors

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[52] Smith v. Phillips speaks to the propriety of questioning the jurors:

> Respondent correctly notes that determinations made in Remmer-type hearings will frequently turn upon testimony of the juror in question, but errs in contending that such evidence is inherently suspect. AS we said in Dennis v. United States, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950), '[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter.' Id., at 171, 70 S.ct., at 523. See also United States v. Reid, 12 How. 361, 366, 13 L.Ed. 1023 (1852).

455 U.S. at 217 n. 7, 102 S.Ct. at 946 n.7.

during questioning, he concluded that no prejudice had been established.

It is appropriate here that we respect that determination by the fact-finder. The panel in Webster emphasized the extensive deference that should be accorded the trial judge in assessing juror bias. As in Webster, we "think the trial court did an admirable job of evaluating the extent of prejudice without contributing to the problem by over emphasis. Moreover, we agree with the trial court that the interviews reveal that the jury was still capable of impartiality." Id. at 339. In other words, the trial court had the right to believe the jurors' unanimous testimony that bribery did not affect their verdict.

Even if we were not convinced that

the district court correctly found an absence of jury prejudice here, we would not permit the perpetrator of jury tampering, in a civil proceeding, to reap the rewards of his misdeed by enjoying a new trial.[53] "Our system of justice has not delegated to every reprobate the power to effect a mistrial." United States v. Williams, 737 F.2d 594, 612 (7th Cir. 1984), cert. denied, 470 U.S> 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985). See also Butler, 822 F.2d at 1196 n. 2 (quoting Williams).

We are mindful that in Forrest, a criminal case, we held that the defendant

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[53] We note that Fryar has been convicted of using Terracina's uncle to offer Terracina a $10,000 bribe. United States v. Fryar, No. CR-87-60027-01 (W.D. La., conviction entered Mar. 14, 1988), appeal docketed, No. 88-4200 (5th Cir. Mar. 14, 1988).

should receive a new trial even though he had tampered with the jury that convicted him. See 620 F.2d at 458-59. However, in Forrest we did not specifically extend the holding to civil proceedings and see no reason to do so now. The liberty interests inherent in a criminal proceedings prove justification for a different result there.

Moreover, equity plays such a central role in our civil jurisprudence that we are loathe to permit civil litigants to view jury tampering as a "heads I win, tails you lose" proposition whereby a party who tampers with the jury might win if he is not caught, and receive a new trial if he is. Accordingly, we hold that Fryar is not entitled to a new trial.

IX. Conclusion.

We REVERSE the judgment against WLJ and Valley Forge. We also DISMISS Valley Forge's appeal as moot to the extent that the appeal challenges the judgment concerning the coverage limits of WLJ's policy.

We REVERSE the district court's judgment against Fryar to the extent it is based upon section 12 of the Securities Act or the LBSL. We also REVERSE the court's judgment awarding damages to the class against Fryar for violating Rule 10b-5, and for violating Louisiana law. We AFFIRM the district court's judgment concerning liability upon the RICO claims against Fryar, and Abell's and Walton's rule 10b-5 claims and non-securities state-law claims against Fryar. Consequently, we also

REVERSE and REMAND the attorneys' fees award against Fryar for redetermination in light of our holdings regarding the liability and non-liability of the various defendants.

We REVERSE and REMAND the damage awards, for redetermination in accordance with the discussion of damages in this opinion. In addition to the ultimate damage award, the court may also award any appropriate judicial interest.

The judgment is AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

App. 279

No. 88-1506

JOE E. FRYAR,

Petitioner

versus

EDWARD C. ABELL, JR., et al

Respondents

July 3, 1989. On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. _____, 109 S. Ct. 2893, _____ L. Ed. 2d _____ (1989).

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., ET AL.	* CIVIL ACTION
VERSUS	* NO. 84-1786
POTOMAC INSURANCE COMPANY OF ILLINOIS, ET AL.	* SECTION "O"
* * * * * * * * * * * * * * * *	* JUDGE SHAW * MAG. METHVIN

R U L I N G

Now before the Court are two motions: 1) the motion by plaintiffs, Edward C. Abell, Jr., Carey Walton, and the class of purchasers of Westside Habilitation Center Revenue Bonds for Order Upholding Jury Verdict, Readjusting Attorneys' Fee Award, and Recalculating Individual Plaintiffs' Damage Award, and 2) the motion by defendant, Joe E. Fryar, to Dismiss Civil RICO Claims. For the following reasons, the motion by

plaintiffs is GRANTED, and the motion by defendant is DENIED.

The RICO claim. Plaintiffs move for an order upholding the verdict against Fryar on the RICO claims, and defendant moves to dismiss the RICO claims on the bases that the RICO statute is unconstitutionally vague and that the evidence does not support the verdict under the case of H.J. Inc. v. Northwestern Bell Telephone Company, Inc., 492 U.S. _____, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989).

The jury found against Fryar on the civil RICO claims. This Court (on post-trial motions) and the Fifth Circuit upheld the award, finding that the evidence abundantly supported the finding of RICO violations. Abell v. Potomac Ins. Co., 858 F.2d 1104 (5th Cir. 1988).

The Supreme Court's and Fifth Circuit's orders sending the matter back to this Court require a reconsideration of the question in view of H.J. Inc. Fryar v. Abell, 109 S. Ct. 3236, 106 L. Ed. 2d 584 (1989); and Abell v. Potomac Ins. Co., 884 F.2d 196 (5th Cir. 1989). In consideration of the principles enunciated in H.J., this Court still holds that the finding of RICO violations is abundantly supported by the evidence.

H.J. defines a "pattern of racketeering activity" to require a showing of related racketeering predicates amounting to or posing a threat of continued criminal activity. H.J. describes "relatedness" to mean that the acts had the same or similar purposes, results, participants, victims, or methods of commission or otherwise are

interrelated by distinguishing characteristics. The Court agrees with plaintiffs that the relatedness requirement is met because the activities all stem from Westside's bond offer, were directed to a common purpose or goal (to defraud the investors and enrich Fryar) and had the same victims (the plaintiff-bondholders).

Defendant argues that the continuity requirement is not met, and that for this reason plaintiffs' motion should be denied and the civil RICO claims dismissed. The Court finds, however, that the continuity requirement was also satisfied in this case such that no grounds exist for overturning the verdict finding RICO violations. Continuity is established by proving that defendant engaged in "a series of related

predicates extending over a substantial period of time" evidencing a threat of continuity. H.J., 106 L. Ed. 2d at 209. This may be shown by, e.g., establishing that 1) "the related predicates themselves involve a distinct threat of long-term racketeering activity"; (2) "the predicate acts or offenses are part of an ongoing entity's regular way of doing business"; or (3) "the predicates are a regular way of conducting defendant's ongoing legitimate business . . . or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'" H.J., 106 L. Ed. 2d at 210.

Fryar's predicate acts of using the mails to execute his scheme to sell bonds with the intent of defrauding the purchasers spanned at least six years.

As the Fifth Circuit noted, he used the mail to obtain and transmit the application forms for Westside's certificate of need, to help AA and interpose it in the transaction, and to send the land transaction documents to AA; he also caused others to use the mails to transmit sales circulars that erroneously portrayed Fryar as purchasing and pledging $2,000,000 of bonds with his own money, and to cover up the fraud and deceive bondholders into believing AA was performing more obligations than it had actually undertaken. See Abell v. Potomac Ins. Co., 858 F.2d 1104, 1130 (5th Cir. 1988).

Additionally, as specified in plaintiffs' memorandum, there was ample evidence showing related corrupt actions

spanning a longer period of time and extending beyond the Westside Bond issue.

The Court rejects defendant's assertion that only sporadic and isolated actions were shown. On the contrary, the evidence showed numerous related acts of defendant directed towards a substantial number of victims over the course of several years, evidencing a threat of long-term racketeering conduct. Thus the Court holds that the evidence in this case easily satisfies the requirement of "continuity" of defendant's "pattern of racketeering activity" as articulated in H.J..

Additionally, this Court rejects defendant's argument that the RICO statute is unconstitutionally vague. For the foregoing reasons, the Court will uphold the jury verdict as to the RICO

claims and deny the defendant's motion to dismiss the RICO claims.

Attorneys' fees. Plaintiffs also move for entry of an order redetermining the amount of attorneys' fees against Fryar in the amount of $2,359,177.50. This Court awarded $2,567,323.30 in attorneys' fees against Fryar, All American and WLJ. The Fifth Circuit's remand order requires adjustment because WLJ was absolved of liability.

Again the Court agrees with plaintiffs. A review of the fee applications presented to the Court during the extensive post-trial hearing shows that $83,258.35 worth of time was spent on claims against WLJ. At the 2.5 multiplier, subtracting this time yields

a reduction of $208,145.88[1]. Subtracting this amount from the award of $2,567,323.30 leaves $2,359,177.42[2], which the Court finds is an appropriate adjudged fee award. The Court finds that Fryar's argument that the fees should be more drastically reduced or eliminated is without foundation in the record.

Individual plaintiffs' awards. In accordance with the Fifth Circuit's remand order, plaintiffs' final request is that this Court recalculate the damages awarded to the individual plaintiffs, Abell and Walton. Plaintiffs have submitted a detailed account of

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[1] $83,258.35
x 2.5
= $208,145.87(5)

[2] $2,567,323.30
- 208,145.88
=$2,359,177.42

their proposal for recalculation of damages which Fryar does not oppose. The Court adopts plaintiffs' recalculation of damages and will allow securities fraud damages in the amounts of $564.72 for Abell and $1,129.26 for Walton.

Fryar's bankruptcy. The Fifth Circuit also directed this Court to reconsider the appropriate disposition of this matter in light of the bankruptcy proceedings of Joe E. Fryar. Abell, 884 F.2d 196.

The judgment entered by this Court in consolidated no. 89-2802"O" withdrew from the bankruptcy court the sole issue of the amount of the reduction of the judgment, if any, entered in this civil action against Joe E. Fryar (the debtor in Bankruptcy Case no. 89-80595-11). Accordingly, the clerk will be directed

to mail a copy of this ruling to the bankruptcy judge and to the bankruptcy clerk for filing in the appropriate adversary proceedings or bankruptcy case.

In accordance with the foregoing, IT IS ORDERED

that the plaintiff's motion to uphold jury verdict be GRANTED;

that the attorneys' fee award be REDUCED to $2,359,177.42.

that the individual plaintiff's awards be adjusted so that Abell's award is $564.72 and Walton's award is $1,129.26; and

that defendant's action to dismiss civil RICO claims be DENIED.

Plaintiffs' counsel is requested to submit a proposed form of judgment to the Court consistent with the Fifth Circuit

opinion and this ruling within 10 days hereof.

The Clerk of Court is instructed to mail a copy of this Ruling (and the judgment to be entered hereon) to the bankruptcy judge and to the bankruptcy clerk, as this ruling is related to Adversary nos. 89-AP8059 and 89-AP8071 (in Bankruptcy Case no. 89-80595-11).

Lafayette, Louisiana, this 2nd day of August, 1990.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., ET AL.	* CIVIL ACTION
	*
	* NO. 84-1786
VERSUS	*
	* SECTION "O"
POTOMAC INSURANCE COMPANY OF ILLINOIS, ET AL.	*
	* JUDGE SHAW
* * * * * * * * * * * * * * * *	* MAG. METHVIN

J U D G M E N T

This action originally having come before the Court and tried before a jury on December 8, 1986, a verdict having been rendered in favor of plaintiffs on February 4, 1987, and judgment thereon having been rendered on February 19, 1987, now comes before the Court upon remand from the United States Court of Appeals for the Fifth Circuit, and the Court having issued a Ruling on August 2, 1990;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs, Edward C. Abell, Jr. and Carey Walton, and the class of purchasers of Westside Habilitation Center Revenue Bonds, and against defendant Joe E. Fryar, in the full and true sum of $2,550,000, together with interest thereon from February 19, 1987 until date of payment, together with all costs of the suit and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff Edward C. Abell, Jr., and against defendant Joe E. Fryar, in the full and true sum of $564.72, together with interest thereon at the rate of 12% from July 5, 1984, the date of judicial demand, until payment,

together with taxable court costs and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiff Carey Walton, and against defendant Joe E. Fryar, in the full and true sum of $1,129.26, together with interest thereon at the rate of 12% from July 5, 1984, the date of judicial demand, until payment, together with taxable court costs and attorneys' fees as set forth below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of all plaintiffs and against Joe E. Fryar in the full and true sum of $2,359,177.42, representing reasonable attorneys' fees. Of this amount, only $909,177.42 shall be payable to counsel

for plaintiffs and the balance shall be paid to the plaintiffs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of all plaintiffs and against defendant Joe E. Fryar for the full and true sum of $263,743.00, representing costs and expenses of this litigation compensable under the RICO statute but not taxable under 28 U.S.C. 1920.

Lafayette, Louisiana, this 5th day of September, 1990.

ROBERT H. SHEMWELL
CLERK OF COURT, UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF LOUISIANA

By: /s/ Ronald G. Weathers
Deputy Clerk

Approved as to form:

/s/ John M. Shaw
John M. Shaw, United
States District Judge

No. 90-4737

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT

EDWARD C. ABELL, JR., ET AL,
Plaintiffs-Appellees,

v.

POTOMAC INSURANCE COMPANY OF ILLINOIS, et al,

Defendants,

JOE E. FRYAR,
Defendant-Appellant.

November 13, 1991.

Bondholders sued developer for violation of federal and state securities laws, state law fraud, and Racketeer Influenced and Corrupt Organizations act (RICO) violations, alleging that developer fraudulently caused issuance of $13,550,000 in tax-exempt revenue bonds on which developer ultimately defaulted. The United States District Court for the

Western District of Louisiana, John M. Shaw, Chief Judge, entered judgment on jury verdict in favor of bondholders awarding damages and attorney fees. Developer appealed. The Court of Appeals, 858 F.2d 1104, 863 F.2d 882, affirmed in part, reversed in part and remanded. Developer petitioned for certiorari. The United States Supreme Court, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584, granted certiorari, vacated judgment and remanded. The Court of Appeals, 884 F.2d 196, remanded to the district court. The district court reinstated jury's RICO verdict and reduced attorney fees by the amount of time spent litigating claims against law firm which was absolved of liability. Developer appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge,

held that: (1) RICO statute was not unconstitutionally vague; (2) facts constituted pattern of racketeering activity within meaning of RICO statute; and (3) Court of Appeals was not required to reduce or to eliminate altogether attorney fees awarded to plaintiffs.

Affirmed.

1. Constitutional Law

Racketeer Influenced and Corrupt Organizations

Racketeer Influenced and Corrupt Organizations Act (RICO) was not unconstitutionally vague as applied to defendant, who over period of more than six years engaged in fraudulent conduct involving more than 500 victims in scheme for selling bonds in order to finance home for mentally retarded and

emotionally disturbed patients. 18 U.S.C.A. §§ 1961 et seq., 1961(5); U.S.C.A. Const.Amend. 5.

2. Racketeer Influenced and Corrupt Organizations

Defendant's mail fraud violations and fact that they were strung together by objective of making money at expense of bondholders were sufficient to satisfy continuity and relatedness requirements of Racketeer Influenced and Corrupt Organizations Act (RICO) pattern. 18 U.S.C.A. § 1961(5).

3. Federal Civil Procedure

Court of Appeals was required to deduct from attorney fees awarded to plaintiffs only those fees incurred solely in developing claims against law firm which was absolved of liability in

action alleging securities fraud and violations of Racketeer Influenced and Corrupt Organizations Act (RICO), and no reduction of fees was required for time spent on unsuccessful issues which was difficult to segregate. 18 U.S.C.A. § 1961 et seq.

Appeal from the United States District Court for the Western District of Louisiana.

Before KING, JOHNSON, and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Defendant-appellant Joe Fryar appeals the district court's judgment, which rejected his argument that the RICO statute is unconstitutionally vague and readjusted the amount of attorneys fees

awarded to plaintiffs by $83,258.35. We Affirm.

I. BACKGROUND

A. Facts

This court has already narrated the complicated facts of this case.[1] The following is a summary of the facts material to this appeal.

Westside Habilitation Center, Inc. ("Westside") is an alleged non-profit corporation based in Cheneyville, Louisiana. According to its developer and creator, Joe Fryar, Westside was conceived to be a home for the mentally retarded and actually became a home to

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[1] See Abell v. Potomac Ins. Co., 858 F.2d 1104, 1109-13 (5th Cir. 1988), cert. granted and judgment vacated, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989).

severely mentally and emotionally-disturbed patients. Westside also became the means by which Fryar made lots of money.

On January 3, 1978, Fryar purchased 6.47 acres of land for the sum of $100,000-the land's appraised value. Fryar then incorporated Westside in 1979. Although a five-member board of directors was appointed, Fryar continued to control Westside and made all of its decisions.

Fryar began Westside with no capital assets; Westside's sole source of revenue and assets was the sale of bonds. According to Fryar's plan, once established, Westside would rely on revenues paid by the State of Louisiana Medicaid program to finance operating expenses and retire these outstanding bonds.

To market his bonds and raise the needed capital, Fryar hired the nationally-known firm of Booz, Allen & Hamilton, Inc. ("B & A") to prepare a financial feasibility report for Westside. B & A did not reach the conclusions Fryar desired; their report raised several areas of concern.[2] Although Fryar did respond to B & A's report by changing his targeted clientele from mentally-retarded to emotionally-

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[2] B & A's report highlighted: (1) the possibility that the state medicaid program would impose ceilings on medicaid reimbursements; (2) the difficulties Westside would encounter in retiring its debt, since it depended entirely upon medicaid reimbursements and lacked adequate sources of working capital; and (3) the inherent faults of the Westside concept in a state whose prevailing policies required placing Westside's potential patients in group homes. 858 F.2d at 1110.

disturbed and mentally-retarded patients, Fryar also threatened B & A with a lawsuit because of their adverse conclusions. Confronted with the possibility of being sued, B & A did agree to sign a letter prepared by Westside's bond counsel, but Fryar was still left without a favorable feasibility report. Fryar ultimately procured a favorable report by retaining Real Estate Research Corporation, a firm primarily experienced in appraising real estate.

Despite Fryar's success in obtaining a favorable feasibility report, the Louisiana State Bond Commission declined to approve financing for Westside bonds. But Fryar again persisted and he eventually convinced the Town of Cheneyville to back a $12,850,000

municipal bond issue. Mysteriously, that bond authorization was later enhanced to $13,550,000.

So preparation of an offering statement for the sale of bonds began. Fryar now relied upon a number of professionals responsible for preparing the Westside bonds for market, including Wright, Lindsey & Jennings ("WLJ"), a Little Rock, Arkansas law firm.[3] WLJ prepared the bond offering and assumed

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[3] Fryar also relied upon: Joseph Hancock and his underwriting firm, Hancock, Joseph & Daniels; Skye, Westside's attorney; Peck, whose firm of Peck, Shaffer & Williams continued to serve as bond counsel; Robert Sheddy of Swink & Co., the other underwriters for the bond issue; and Mintz, Levin, Cohn, Ferris, Glovsky & Popeo--a Boston law firm that was then counsel for the two underwriters. Mintz, Levin resigned as underwriter's counsel just a few weeks before Westside's scheduled closing of its bond deal with the underwriters, and the underwriters immediately hired WLJ.

strict "due diligence" duties; WLJ was responsible for carefully reviewing the final offering statement and for interviewing all key participants in the bond transaction. WLJ did not adequately investigate the bond transaction and failed to uncover details of how Westside acquired its facilities--the layered transaction responsible for this multi-million-dollar litigation;

(i) in 1978, Fryar bought the land eventually used to establish Westside for $100,000 ("the land");

(ii) in 1981, Fryar helped to create All American, a Bermuda corporation controlled by Fryar;

(iii) also in 1981, Fryar then sold the Land to All American for $150,000, making an immediate 50-

percent profit after owning the Land for three years;

(iv) in 1982, All American sold the Land to Westside for $2,479,000 (more than fifteen times what All American originally paid)--$479,000 in cash and the remaining $2,000,000 in tax-exempt municipal Westside bonds; and

(v) All American retained its ownership interest in the bonds but allowed Fryar to pledge them as security for his performance of duties as developer of Westside--enabling Fryar to later claim that he had over $2,000,000 of his own money at risk in Westside.

The offering statement WLJ prepared contained no information regarding the B & A report, contained no mention of the

fact that Fryar had once owned the Land, and flatly reported that Fryar had pledged $2,000,000 of Westside bonds to the project's success--suggesting that Fryar had pledged his own money.

Westside and its underwriters closed their bond deal on April 20, 1982. The underwriters subscribed to the entire issue of bonds and undertook the task of selling, which they did quickly and without difficulty.

Then the facts began to publicly surface. A local newspaper caught wind of the Land transaction, began to dig, and further unearthed its details. Also, a bank failure and delays cost Westside some $300,000, and resulting litigation forced Swink & Co., the underwriter for the bond issue, to send a reassuring letter to all bondholders. That letter,

dated January 20, 1983, finally revealed information wrongfully withheld from the offering statement.

This lawsuit was initiated on behalf of a class of 500 Westside bondholders on July 5, 1984. In October, Westside's financial structure crumbled: Westside defaulted on an interest payment on its bonds and in March of 1985 was forced to file Chapter XI bankruptcy.

The Bondholders did not fare well in bankruptcy and are now entitled to interest payments considerably lower than promised. As of December 8, 1986, the time this case first went to trial, All American had made $2,950,000 from the land transaction and interest payments it received from Westside bonds; the

bondholders had lost more than $12,000,000.[4]

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[4] According to plaintiffs, related transactions also enhanced Fryar's wealth at the bondholders' expense:

> [Fryar] submitted reimbursement claims to the State of Louisiana Medicaid program which misrepresented the true cost of the facility, the obligations of Westside and the fact that the bondholders were not being paid the interest owed. As a result of these misrepresentations, Fryar received payments from the state of Louisiana Medicaid program substantially in excess of what should have been paid. More importantly, Fryar pocketed the money paid as reimbursement on debts to the bondholders, thereby profiting personally by an amount in excess of $1,300,000.

Brief of Appellees Edward C. Abell, Jr. and Carey Walton, Individually, and as Representatives of the Class of Purchasers of Westside Habilitation Center Revenue Bonds at 16-17, Abell v. Potomac Ins. Co. of Ill, No. 90-4737 (filed Apr. 30, 1991) ["Appellees' Brief"].

B. Proceedings

This action was commenced on July 5, 1984, by Edward C. Abell, Jr. and Carey Walton, individually and on behalf of the class of purchasers of Westside bonds, for (i) violations of federal and state securities laws, (ii) state law fraud, and (iii) RICO.[5] According to plaintiffs, Fryar fraudulently caused Westside to issue $13,550,000 in tax-exempt revenue bonds, which ultimately defaulted and inflicted millions of

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[5] More specifically, plaintiffs invoked section 12 of the Securities Act of 1933, 15 U.S.C. § 771(1), (2); section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Rule 10b-5, 17 C.F.R. § 240.10b-5; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68; the Louisiana Securities Law, La.Rev.Stat. Ann. § 51:714 (West 1987); and provisions of Louisiana substantive law regarding fraud, breach of fiduciary duty, and negligent misrepresentation.

dollars in losses on bondholders. Following a nine week trial, a jury returned a verdict for plaintiffs on all counts, and judgment was entered on February 19, 1987. The jury awarded plaintiffs $12,096,866.80 in damages, including $2,550,000 for RICO violations and $2,567,323.80 for attorneys' fees.

On appeal, this court affirmed the district court's judgment on plaintiffs' RICO claims and affirmed the RICO award in favor of plaintiffs, holding that "the jury awarded plaintiffs considerably less than the damages which they proved at trial."[6] This court did, however, order

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[6] Abell, 858 F.2d at 1140. This court actually affirmed the district court in part, reversed in part, and remanded by holding that:

(1) bond counsel and person whose corporation issued the bonds were not "sellers" for purposes of the Securities Act or the Louisiana Blue

the district court to readjust the attorneys fees award to compensate plaintiffs only for the legal resources which they expended to develop a case against Fryar and All American.

Fryar filed a Petition for Certiorari to the United States Supreme Court on March 13, 1989, arguing that

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Sky law; (2) statements were shown to be material; (3) plaintiffs could not use Ute presumption of fraud on the market theory to show reliance by class; (4) plaintiffs did not show any reliance on statements made by bond counsel; (5) bond counsel could not be held liable on breach of fiduciary duty or other theories with respect to nonclients; (6) attorneys were not vicariously liable; (7) plaintiffs established RICO violation by developer whose corporation issued the bonds; (8) plaintiffs were not limited to out-of-pocket damages; and (9) developer did not show that he was prejudiced by jury's knowledge of his attempt to bribe one juror.

Id. at 1104.

plaintiffs had failed to establish distinct multiple schemes and that they had, therefore, failed to establish a pattern of racketeering activity. On July 3, 1989, the United States Supreme Court granted petitions for certiorari in nine cases, including this one, in which the issue of sufficiency of a pattern of racketeering activity was raised.[7] In light of the Supreme Court's decision discussing the appropriate standard for establishing a pattern of racketeering activity under RICO,[8] the Court systematically remanded the nine cases on this issue decided prior to H.J. for reconsideration.

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[7] See Fryar v. Abell, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989).

[8] See H.J. Inc. v. Northwestern Bell Tel. Co., Inc., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).

On September 12, 1989, this court then remanded the matter back down to the district court for further consideration in light of H.J. and Fryar's pending bankruptcy proceeding.[9] Plaintiffs moved for reinstatement of the jury's RICO verdict and the award of attorneys' fees, and Fryar moved to dismiss plaintiffs' RICO claims, arguing for the first time that the RICO statute is unconstitutionally vague.

The district court granted plaintiffs' motion, upholding the jury's verdict in light of H.J. and rejecting Fryar's argument that RICO is

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[9] See Abell v. Potomac Ins. Co., 884 F.2d 196 (5th Cir. 1989); In re Joe E. Fryar, Docket Number 89-BK-80595-11 (Bankr.W.D.La. 1989).

unconstitutionally vague.'[10] In accordance with this court's instruction, the district court readjusted the amount of attorneys' fees awarded plaintiffs, reducing the award to $2,359,177.42; the district court concluded that $83,258.35 worth of time was spent litigating claims against the law firm of Wright, Lindsey & Jennings ("WLJ"), which this Court absolved of liability.

Judgment was entered on September 5, 1990, reaffirming the jury's RICO verdict and entering the adjusted award of attorneys' fees. It is from this judgment that Fryar now appeals.

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[10] See Abell v. Potomac Ins. Co., No. 84-1786, Ruling at 1-5 (W.D.La. Aug. 2, 1990) ["Ruling"].

II. DISCUSSION

This case is before us once again for reconsideration in light of H.J.--the Supreme Court's effort to walk onto a site of interpretive confusion and construct a standard for establishing what constitutes a "pattern of racketeering activity" under RICO. See generally H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). In H.J., where customers of a telephone company alleged that the company had been bribing state officials to gain approval for excessive telephone rates, the Court reversed the district court's judgment granting defendants motion to dismiss. The Court held that "RICO defines bribery as a 'racketeering activity,' 18 U.S.C. § 1961(1), so petitioners have[,as required

under RICO,] alleged multiple predicate acts", and the Court reversed the district court on the ground that "petitioners may be able to prove that the multiple predicates alleged constitute 'a pattern of racketeering activity,' in that they satisfy the requirements of relationship and continuity." Id. at 250, 109 S.Ct. at 2906 (emphasis added). Beyond showing the commission of at least two predicate offenses on a specific list,'' H.J.'s prescription for a "pattern of racketeering activity" calls for a showing "that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal

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'' This list has been codified at 18 U.S.C.A. §§ 1961(1), (5) (1984 & Supp. 1991).

activity." Id. at 239, 109 S.Ct. at 2900 (emphasis in original).

Along with these relatedness and continuity requirements, the Court introduced tests to establish their presence. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1412-13 (3rd Cir. 1991). For relatedness, the Court adopted a broad multi-factor test that turns on whether the alleged predicate acts "'are interrelated by distinguishing characteristics and are not isolated events.'" H.J., 492 U.S. at 240, 109 S.Ct. at 2901 (quotation omitted). As for continuity, the Court noted that proof of multiple schemes is "highly relevant" to the question of continuity but not a prerequisite,[12] and

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[12] See id. 492 U.S. at 240, 109 S.Ct. at 2901.

defined continuity as "referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." Id. at 241, 109 S.Ct. at 2902. As was recognized by the Court, these tests are highly fact- and case-specific. See id. at 237, 242, 109 S.Ct. at 2899, 2902, Kehr Packages, 926 F.2d at 1412-13.

Exercising the opportunity provided by H.J., appellants have returned to this court with three questions of law in hand: (a) whether the provisions of the RICO statute, 18 U.S.C. §§ 1961, et seq., and in particular 18 U.S.C. § 1961(5), are unconstitutionally vague in violation of the procedural due process guarantees of the U.S. Const. amend. V; (b) alternatively, whether the uncontested

facts in this case constitute proof of "a pattern of racketeering activity" within the meaning of the RICO statute an interpreted and applied; and (c) whether this court should substantially reduce or eliminate altogether the attorneys' fees awarded plaintiffs. To fully address these questions, we will consider each of them individually.

A. Fryar's Constitutional Challenge

[1] When we remanded this case to the district court for consideration, we did so with an explicit mandate: "This cause is REMANDED to the district court for further consideration in light of H.J. Inc. The district court shall also consider the appropriate disposition of

this matter in light of the pending bankruptcy proceeding."[13] We did not lower a pinata of issues for Fryar to split open, returning to this court with his arms full.

The H.J. opinion scripted by Justice Brennan and delivered by the Court is actually an effort to overcome RICO ambiguity--and, therefore, add constitutional undergirding to the statute--by establishing a "pattern of racketeering activity" standard for RICO. See generally H.J., 492 U.S. at 229, 109 S.Ct. at 2893. Fryar has not constructed his constitutional challenge to RICO from the holdings of H.J. Rather, he has pulled his argument out of the H.J. concurrence of Justice Scalia, from which

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[13] Abell, 884 F.2d 196.

he quotes in his brief at length.[14] See e.g., Original Brief of Defendant-Appellant Joe E. Fryar at 19-21, Abell v. Fryar, No. 90-4737 (5th Cir. filed Apr. 1, 1991) ["Appellant's Brief"]. The gist of Justice Scalia's concurrence is captured in the following excerpt:

> Today, four years and countless millions in damages and attorneys' fees later (not to mention prison sentences under the criminal provisions of

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[14] Fryar is certainly not the first to raise a vagueness challenge to RICO with citations to Justice Scalia's concurrence; others have also tried and failed. See, e.g., United States v. Glecier, 923 F.2d 496, 497 n. 1 (7th Cir. 1991); United States v. Coiro, 922 F.2d 1008, 1017 (2d Cir. 1991); United States v. Pungitore, 910 F.2d 1084, 1104-05 (3d Cir. 1990); United States v. Angiulo, 897 F.2d 1169, 1179-80 (1st Cir. 1990), cert. denied, ____ U.S. ____, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990).

RICO), the Court does little more than repromulgate those hints as to what RICO means, though with the caveat that Congress intended that they be applied using a "flexible approach."

* * * * *

Today's opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of circuit positions, except to clarify that RICO may in addition be violated when there is a "threat of continuity." It seems to me this increases rather than removes the vagueness.

H.J. 492 U.S. at 251, 255, 109 S.Ct. at 2907, 2908 (quoted in Appellant's Brief at 20-21).

The force of Justice Scalia's concurrence and the fact that it was joined by the Chief of Justice and Justices O'Connor and Kennedy--all currently members of a Court that has changed its composition since deciding H.J.--do add a thick coat of lacquer to appellant's argument. Nevertheless, the scope of the Supreme Court's remand is narrow and we only proceed to the outer edge of the Court's H.J. holdings--despite the efforts of appellant to entice us beyond. See Robinson v. Ariyoshi, 854 F.2d 1189 (9th Cir. 1988). Cautiously aware that we are standing on that edge, we now consider Fryar's constitutional contention.

First, this court cannot simply overlook the fact that Fryar has waited six years after the commencement of this case, four years after a nine-week jury trial resulting in a jury verdict in favor of plaintiffs, and two and one-half years after this court affirmed the judgment on plaintiffs' RICO claims to launch his constitutional attack on the RICO statute. Justice Scalia's concurrence did not create the alleged constitutional problems with RICO, and the Supreme Court did not pull H.J. out of a jurisprudential vacuum.[15] "Untimely" is, therefore an understatement. See Minpeco, S.A. v.

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[15] In fact, the Court constructed H.J. from a bulky body of case law discussing the elements necessary to establish RICO liability--including the continuity requirement. See, e.g., Sedima, S.P.R.L. v. Imrex Co., Inc., 473

Hunt, 724 F.Supp. 259, 260 (S.D.N.Y. 1989) (defendants criticized for first

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U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (discussing elements regarding "pattern of racketeering activity."); United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) (en banc) (rejecting multiple scheme requirement; two or more interrelated acts with showing of continuity or threat of continuity is sufficient), cert. denied, _____ U.S. _____, 110 S.Ct. 56, 107 L.Ed.2d 24 (1989); United States v. Jennings, 842 F.2d 159 (6th Cir. 1988) (two predicate acts are potentially enough); Barticheck v. Fidelity Union Bank/First National State, 832 F.2d 36 (3d Cir. 1987) (rejecting multiple scheme requirement: adopting case-by-case multifactor test); Sun Sav. and Loan Ass'n. v. Dierdorff, 825 F.2d 187 (9th Cir. 1987) (requiring two predicates, separate in time, which are not isolated events; Roeder v. Alpha Indus, 814 F.2d 22, 30 (1st Cir. 1987) (to establish "pattern", not enough that racketeering acts constitute two or more: "The constituent elements must be sufficiently related to one another and threaten to be more than an isolated occurrence"); Torwest DBC Inc. v. Dick, 810 F.2d 925 (10th Cir. 1987) (holding single-objective scheme with no threat of continuity insufficient); Bank of Am. Nat'l Trust & Sav. Ass'n v. Touche Ross &

asserting constitutional challenge to trial motions).[16]

Still, let us take one step more and consider the substance of Fryar's constitutional challenge. Fryar notes that a statute is unconstitutionally vague when it "either forbids or requires

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Co., 782 F.2d 966 (11th Cir. 1986) (requiring that predicates be interrelated).

[16] The facts in Minpeco, S.A. v. Hunt, 724 F.Supp. 259, 260 (S.D.N.Y. 1989), are precisely on point with the facts before us. Consider that court's holding:

> [I]n spite of the interest created in the legal profession by the challenging remarks contained in Justice Scalia's concurrence, and although he spoke for three other Justices, his concurrence does not constitute a formal development of the law which would justify declaring the statute unconstitutional at this stage of the exhaustive proceedings in this case.

Id. at 260.

the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,"[17] and goes on to argue that:

> Certainly, if the justices of the Supreme Court, the circuit judges sitting on the various Courts of Appeals and the district court judges are unable to discern the meaning of "pattern of racketeering activity" from 18 U.S.C. §§ 1961, et seq., then men of common intelligence must necessarily guess as its meaning and differ as to its application.

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[17] Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); see also Appellant's Brief at 19.

Appellant's Brief at 22.[18]

In bringing his constitutional contention to us, Fryar is apparently overlooking the principle that "outside the First Amendment context, a party has standing to raise a vagueness challenge only insofar as the statute is vague as applied to his or her specific conduct." United States v. Pungitore, 910 F.2d 1084, 1104 (3d Cir. 1990), cert. denied, _____ U.S. _____, 111 S.Ct. 2010, 114

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[18] More specifically, Fryar argues that:

> Clearly, 18 U.S.C. § 1961(5) does not set forth a definition or notice of what constitutes a "pattern of racketeering activity." Instead, the statute only sets forth a minimum necessary condition for the existence of such a pattern. 18 U.S.C. §§ 1961, et seq., does not contain any other provision relating to the essential element of a "pattern of racketeering activity."

Appellant's Brief at 11 (emphasis in original).

L.Ed.2d 98 (1991); see also United States v. Angiulo, 897 F.2d 1169, 1179 (1st Cir. 1990) (in absence of First Amendment considerations, vagueness challenge must be examined in light of a case's particular facts), cert. denied, _____ U.S. _____, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990). For his vagueness challenge to succeed, Fryar would have had to show this Court that the scope of RICO's "pattern" element was so unclear that a person of ordinary intelligence in Fryar's position would not have had adequate notice that his actions constituted a "pattern of racketeering activity." See id. at 1179. A myriad of fraudulent conduct spanning more than six years and involving more than five hundred victims--based on the evidence adduced at trial, it follows that Fryar's

facial attack on the constitutionality of RICO is simply too superficial to accept.[19]

B. Fryar's Nonconstitutional RICO Challenge: The Question of Continuity

[2] A "Pattern of racketeering activity" is a necessary element for establishing the "prohibited activities" that trigger RICO liability. See 18 U.S.C.A. §§ 1961, 1961(5) (1984 & Supp. 1991). As noted by Justice Scalia, it is

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[19] See generally Abell v. Potomac Inc. Co., 858 F.2d 1104, 1109-13 (5th Cir. 1988); id. at 1130:

> Here, plaintiffs alleged that Fryar had repeatedly used the mails to execute a scheme to sell Westside bonds with the intent of defrauding the purchasers. The record amply supports the jury's conclusion that Fryar, intending to defraud potential investors, devised and employed a scheme to sell Westside bonds. Fryar knowingly misled prospective bondholders about a land transaction that significantly affected Westside's financial

also the cause of "the widest and most persistent circuit split on an issue of federal law in recent memory." H.J., 492 U.S. at 251, 109 S.Ct. at 2906-07.

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structure. He falsely suggested that he had backed the health-care project with $2,000,000 of his own money. Obviously, the jury could find that Fryar had a reasonably calculated plan to deceive persons of ordinary prudence and comprehension into giving Westside their money.

Nor does Fryar contest whether he used the mails repeatedly to execute this scheme; indeed, the evidence is overwhelming that he did. Fryar used the mails to obtain and transmit the application forms for Westside's certificate of need; to help create All American and interpose it in the transaction; and to send the land transaction documents to All American. He also caused others to use the mails to transmit the sales circulars that erroneously portrayed Fryar as purchasing and pledging $2,000,000 of bonds with his own money; and finally, he caused the mails to be used in an attempt to cover up the

Although our opinion has been vacated by the Court's systematic remand of nine cases on the issue now again before us, this court has already affirmed the judgment for plaintiffs' RICO claims against Fryar for the activities in question, noting that "the evidence strongly supports the jury's RICO verdict." 858 F.2d at 1130 (emphasis added). H.J. has, if anything, resolved rather than revolutionized the law, and the Fryar facts have not changed.[20]

(Continued from previous page)

fraud and deceive bondholders into believing All American was performing more obligations than it had actually undertaken. Thus, the evidence strongly supports the jury's RICO verdict.

[20] See supra notes 15 and 19.

RICO defines mail fraud as a "racketeering activity."[21] Mail was the means by which Mr. Fryar, among other things, carried out his infamous land transaction.[22] For example, in 1981 and 1982, the mails were used to (i) create All American, (ii) set up All American as the purchaser of Fryar's land, (iii) carry out a sale of that land to Westside for fifteen times what All American originally paid for it, and (iv) to transmit sales circulars that deceptively portrayed Fryar as purchasing and pledging $2,000,000 in bonds paid for with his own money.

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[21] 18 U.S.C.A. section 1961(1)(B) (1984 & Supp. 1991) states that "'racketeering activity' means any act which is indictable under any of the following provisions of title 18, United States Code ... section 1341 (relating to mail fraud)."

[22] Discussed supra at Part I.A.

The essence of the Court's H.J. holding is that:

> RICO legislative history ... establishes that Congress intended that to prove a "pattern of racketeering activity" a plaintiff or prosecutor show both "relationship" and "continuity"--that the racketeering predicates are related, and that they either constitute or threaten long-term criminal activity.

492 U.S. at 230, 109 S.Ct. at 2896 (citation omitted). According to Fryar, rather than being related and continuous, his criminal acts were isolated and

sporadic.[23] The district court, applying the principles of H.J. disagreed:

> The Court agrees with plaintiffs that the relatedness requirement is met because the activities all stem from Westside's bond offer were directed to a common purpose or goal (to defraud the investors and enrich Fryar) and had the same victims (the plaintiff-bond holders).
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> * * * * * *

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[23] Appellant's Brief at 23:
In particular, plaintiffs failed to produce any evidence of racketeering activities engaged in by defendant that amounted to or threatened long-term criminal activity, i.e., the "continuity" requirement for proving the existence of a "pattern of racketeering activity." Instead, plaintiffs were only able to show that appellant Fryar engaged in isolated and sporadic criminal acts related to the Westside bond offer.

> Continuity is established by proving that defendant engaged in "a series of related predicates extending over a substantial period of time" evidencing a threat of continuity. This may be shown by, e.g., establishing that (1) "the related predicates themselves involve a distinct threat of long-term racketeering activity"; (2) "the predicate acts or offenses are part of an ongoing entity's regular way of doing business"; or (3) "the predicates are a regular way of conducting or participating in an ongoing and legitimate RICO 'enterprise.'"

Ruling at 2-3, quoting H.J., 492 U.S. at 229, 109 S.Ct. at 2893 (citations omitted); see also Kehr Packages, Inc. v.

Fidelcor, Inc., 926 F.2d 1406, 1412-13 (3d Cir. 1991) (discussing how to satisfy tests for establishing relatedness and continuity).

H.J.'s relatedness and continuity tests are fact-specific,[24] and the facts adduced at trial and piled up high against Fryar--some 500 bondholders cheated out of millions of dollars in a scheme that spread itself out over more than six years--are damning. We have no need to sharpen our pencils for subtle RICO analysis: Fryar's mail fraud violations and the fact that these violations were, as observed by the district court, strung together by the making-money-at-the-expense-of-

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[24] See id. 492 U.S. at 237, 242, 109 S.Ct. at 2899, 2902; Kehr Packages, 926 F.2d at 1412-13.

bondholders objective realized by Fryar are enough. Fryar's conduct has, therefore, easily surpassed the RICO threshold, and we affirm the district court's RICO judgment against him.

C. The Question of Attorneys' Fees

[3] In our opinion vacated by the Supreme Court, we absolved the law firm of WLJ of liability and ordered the district court to compensate plaintiffs only for legal resources expended to develop their case against Fryar and All American.[25] The district court obliged, reducing the attorneys' fees awarded against Fryar by $83,258.35.[26] Now Fryar asks us to do that again, pleading "that

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[25] See 858 F.2d at 1142.

[26] Ruling at 4-6 (reduction based upon review of fee applications numbering 143 pages and reflecting thousands of individual work entries).

the district court did not delineate and differentiate the professional activities of plaintiffs' counsel as to all of the defendants..."[27]

Where time spent on unsuccessful issues is difficult to segregate, no reduction of fees is required. See Riverside v. Rivera, 477 U.S. 561, 569-74, 106 S.Ct. 2686, 2691-93, 91 L.Ed.2d 466 (1986); Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S.Ct. 1933, 1940, 76 L.Ed.2d 40 (1983). Therefore, we only need deduct for fees incurred solely in developing claims against WLJ.

Having thoroughly reviewed the record, we agree with appellees:

> little time was spent solely developing claims against WLJ for

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[27] Appellant's Brief at 35.

> trial. With the exception of the legal malpractice claim, the same claims asserted against WLJ were asserted against Fryar.... Even if WLJ had not been a defendant, proof of its involvement nevertheless was required to rebut defenses of reliance on counsel and that the loss resulted from the actions of others.[28]

Fryar has already received a significant reduction in the attorneys' fees awarded against him. Had he substantiated that a larger portion of the legal fees incurred by plaintiffs were spent on developing claims solely against defendant WLJ, Fryar would probably have received a

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[28] Appellees' Brief at 42.

greater reduction.[29] In the absence of such substantiation, we affirm the judgment of the district court.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[29] The brief Fryar submitted to this court is, to say the least, thin on this point. The most he has to offer us is that the case began with 12 defendants and "[a]t trial appellant Fryar, Wright, Lindsey & Jennings and All American Service Company, Ltd. remained as defendants, plaintiffs having settled by compromise their claims against the other defendants." Appellants Brief at 32-35. This is simply not enough to raise reservations regarding the district court's determination.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 90-4737

EDWARD C. ABELL, JR., ET AL

Plaintiffs-Appellees,

versus

POTOMAC INSURANCE COMPANY OF ILLINOIS, ET AL.,

Defendants,

JOE E. FRYAR,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING

(DECEMBER 11, 1991)

Before KING, JOHNSON and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE DIVISION

EDWARD C. ABELL, JR. AND CAREY WALTON, PLAINTIFFS	*	CIVIL ACTION
	*	CV84-1786
VERSUS	*	NO. _____
POTOMAC INSURANCE COMPANY OF ILLINOIS, NATIONAL UNION FIRE INSURANCE COMPANY, JOE E. FRYAR, HANCOCK, JOSEPH & DANIELS, JOSEPH HANCOCK, SWINK & CO., INC., WILLIAM E. SKYE, JOHN W. PECK, PECK SHAFFER & WILLIAMS, WRIGHT, LINDSEY & JENNINGS, ABC INSURANCE COMPANY, and RODNEY KENDRICK, DEFENDANTS	*	SECTION _____
	*	MAGISTRATE DIV. _____
	*	JURY TRIAL DEMANDED

COMPLAINT IN A CLASS ACTION UNDER THE SECURITIES ACT OF 1933, THE SECURITIES EXCHANGE ACT OF 1934, RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT, THE LOUISIANA BLUE LAW AND OTHER LAWS

(Filed July 5, 1984)

* * *

GENERAL ALLEGATIONS

13. Commencing during or prior to the year 1976, and continuing through and including 1982, the Fryar Group, the Hancock Group, and Skye embarked upon a scheme and a pattern of racketeering activity for the purpose of enriching themselves by and through the issuance and offering to the public of revenue bonds, the proceeds of which were to be issued to construct an intermediate care facility for the mentally retarded.

* * *

15. Pursuant to the scheme, Fryar and Charles S. Bollinger ("Bollinger") purchased approximately 6.47 acres of land, including a vacant school building, in Cheneyville, Louisiana (hereinafter referred to as the "Cheneyville Property"), from the Rapides Parish

School Board on or about January 3, 1978 for the sum of $100,000. On or about August 16, 1979, Fryar purchased Bollinger's interest in the above-described property by assuming a mortgage on the land and building.

* * *

18. During the summer of 1981, the Fryar Group, the Hancock Group and Skye began to finalize their scheme to issue to the Bonds to finance the acquisition and construction of Westside. Toward that end, Peck, PSW, and WLJ, were retained to act as bond counsel and as counsel to the underwriters. In addition, Swink was retained, together with HJD, to underwrite the issuance.

19. During the late summer or fall of 1981, the Fryar Group, the Hancock Group and Skye caused a consulting firm

to conduct a market and feasibility study concerning Westside (the "Feasibility Study"). On information and belief, the results of the Feasibility Study were unfavorable.

* * *

22. Notwithstanding the opposition to Westside and the adverse results of the Feasibility Study, the defendants agreed to proceed with the scheme to market the Bonds. Toward that end, defendants agreed that Westside, Inc. would issue to the public $13,550,000 of revenue bonds through sale of the Bonds at a substantial discount to HJD and Swink, which in turn, would resell the Bonds to the public at face value. HJD and Swink were to receive a profit exceeding $1,000,000 from the initial sale to the public.

* * *

24. To conceal the scheme to have Westside purchase for $2,459,700 the same Cheneyville Property acquired by Fryar for a substantially lesser sum, Fryar, assisted by Skye (who drafted and notarized the relevant documents for the transaction, including the act of sale), Hancock, Kendrick and others, sold the property for $150,000 in late 1981 to All American Service Company, Ltd., also doing business as AA Service Company, Ltd. ("All American"), a Bermuda corporation. Payment to Fryar of the $150,000 purchase price by All American was conditioned upon the subsequent sale of the Cheneyville Property to Westside for $2,459,700.

* * *

27. In accordance with the general scheme, the Bonds were to be issued by Westside, Inc. pursuant to an indenture of trust (the "Indenture") between Westside, Inc. and a corporate trustee (the "Trustee"). Fryar was then to enter into a development agreement with Westside, Inc. (the "Development Agreement"), providing for the construction of the Westside facility on the Cheneyville Property for a cost in excess of $5,000,000. Fryar individually was to receive fees in excess of $900,000 under the Development Agreement.

* * *

30. To conceal the transaction whereby Fryar would purchase the $2 million of Bonds with the profit received from the sale to Westside of the Cheneyville Property, the defendants

caused the ownership of the $2 million dollars of Bonds to be registered in the name of All American.

* * *

38. In connection with the solicitation of purchasers and the sale of the Bonds, defendants, for the purpose of executing their scheme, placed or caused to be placed in an authorized depository for mail matter, copies of the Official Statement and other documents to be sent or delivered by the Postal Service to prospective investors, including Abell and Walton. Further for the purpose of executing their scheme, defendants transmitted or caused to be transmitted by means of wire, and other means of interstate communication, writings, signs, signals, pictures or sounds.

* * *

68. In connection with the purchase and sale to Abell, Walton and other Bond Purchasers, defendants intentionally or by severe recklessness, directly or indirectly, employed a scheme or artifice to defraud Abell, Walton and other Bond Purchasers by conspiring to bring securities onto the market which were not entitled to be marketed; by making untrue statements of material fact or omitting to state material facts necessary to make the statements made, in light of the circumstances in which they were made, not misleading; and by engaging in acts, practices, and/or a course of business which operated as a fraud or deceit, in the respects, among others, set forth in the General Allegations, all in contravention of the provisions of

Section 10 of the Exchange Ace and Rule 10b-5 of the Securities and Exchange Commission

69. Alternatively, each defendant knew or should have known by the exercise of due diligence of the scheme or artifice to defraud Abell, Walton and the other Bond Purchasers in the purchase and sale of securities, and that his

* * *

---

* * *

In order to prove a "pattern" of racketeering activity, it is not sufficient for the plaintiffs to prove only that Fryar and/or All American committed two of the racketeering acts I have just described. You also must find that the acts committed constitute a pattern of racketeering activity.

A series of disconnected acts does not constitute a pattern, and a series of disconnected crimes does not constitute a pattern of racketeering activity.

In order to prove a pattern of racketeering activity, the plaintiffs must prove, by a preponderance of the evidence, that at least two of the alleged racketeering acts were connected with one common scheme, plan or motive.

Plaintiffs are not required to prove the existence of multiple fraudulent schemes.

---

(3)

No. 91-1470

Supreme Court, U.S.
FILED
APR 13 1992
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In The

Supreme Court of the United States

October Term, 1991

JOE E. FRYAR,

Petitioner,

versus

EDWARD C. ABELL, JR. AND CAREY WALTON, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF PURCHASERS OF WESTSIDE HABILITATION CENTER REVENUE BONDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON BEHALF OF EDWARD C. ABELL, JR. AND CAREY WALTON, INDIVIDUALLY AND AS REPRESENTATIVES OF THE CLASS OF PURCHASERS OF WESTSIDE HABILITATION CENTER REVENUE BONDS OPPOSING JOE E. FRYAR'S PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

1. Introduction.

Petitioner Joe E. Fryar ("Fryar") seeks review of a decision of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") affirming a judgment entered by the district court reinstating a jury verdict rendered after a nine-week trial in favor of the plaintiff class. The verdict found Fryar and All American Services Company, Limited ("AA"), a Bermuda corporation organized and controlled by Fryar, liable for violations of RICO. Fryar attacks the Court of Appeals' decision, asserting that (1) the RICO statute is unconstitutionally vague; (2) the district court's reconsideration of the jury's RICO verdict in light of the decision in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989) pursuant to this Court's mandate violated Fryar's due process rights by retroactively applying a substantive change in the law; (3) and the remand and reconsideration by the district court somehow constitutes an infringement of Fryar's right to trial by jury under the Seventh Amendment. Fryar's petition is meritless, failing to present any basis for review of the decision below on writ of certiorari. First, Fryar's constitutional challenge to the RICO statute which was first asserted six years after commencement of the case, four years after a nine-week jury trial resulting in a jury verdict in favor of plaintiff, and two and one-half years after the Court of Appeals affirmed the jury verdict is untimely and should not be considered. Fryar's two other constitutional challenges raised for the first time in the Court of Appeals on petition for rehearing also are untimely and should not be considered. Second, as found by the Court of Appeals,

Fryar's facial attack on the constitutionality of RICO is simply too superficial to accept. Fryar has not and cannot establish that the statute failed to give fair notice that *his conduct* was forbidden as required to support a vagueness challenge outside the First Amendment context. Third, the consideration of the *H.J.* decision which did not constitute a substantive expansion of the law, did not violate Fryar's due process rights. Moreover, if *H.J.* did effect a substantive change in the law which should not be applied retroactively, the prior law as stated in *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985) should apply. Accordingly, the original Court of Appeals' decision affirming the jury's RICO verdict under *R.A.G.S.* is correct and should not be reviewed. Finally, reconsideration of the jury verdict in light of *H.J.* by the district court rather than a new jury did not violate Fryar's right to trial by jury. Fryar who opposed the remand to the district court and who failed to request in the courts below a trial by jury of the reconsideration issue waived his right, if any, to trial by jury. Further, a party does not have a constitutional right to trial by jury of the reconsideration of a prior jury verdict.

2. Background.

Beginning in 1976 and continuing through the trial in 1987, Fryar and AA conducted a scheme to defraud bondholders and enrich themselves. In essence, Fryar formed an allegedly non-profit corporation, Westside Habilitation Center, Inc. ("Westside") to own and operate a home for the mentally retarded in Cheneyville, Louisiana. Fryar, with the assistance of AA and others, caused Westside to issue bonds in the amount of $13,550,000 to the

public and used the proceeds to finance the acquisition and construction of the facility at grossly inflated prices for his own enrichment. Fryar, thereafter, reaped substantial profits during his operation of the facility by, among other things, submitting false reimbursement claims to the State of Louisiana Medicaid program and refusing to pay the bondholders interest due. Fryar concealed the fraud by interposing AA in the chain of title to the property purchased by Westside and by failing to disclose to Westside's accountant the true state of affairs. Fryar's and/or AA's concealment of the deceit continued throughout this litigation by concealing documents, fabricating documents, threatening a witness to prevent his appearing to testify, and finally by attempting to bribe the jury at trial.[1]

a. Origin of the Project.

Fryar masterminded the Westside project. First, he obtained certification from the State of Louisiana to build a facility having a projected cost of $1,983,500, despite opposition from officials in the Louisiana Department of Health and Human Resources because of the excessive costs, anticipated substantial profit and questionable need.

Next, Fryar purchased 6.47 acres and a thirty year old vacant school building in Cheneyville, Louisiana

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[1] Fryar subsequently was convicted of attempting to bribe the jury. *U.S. v. Fryar*, No. CR-87-60027-01 (W.D. La. 1988). Fryar's conviction was affirmed by the Court of Appeals. *U.S. v. Fryar*, 867 F.2d 850 (5th Cir. 1989). (A-1).

("Cheneyville Property") from the Rapides Parish School Board for $100,000, its appraised value. Fryar then hired his attorney to incorporate Westside, which had no capital assets. Although a five member board of directors of Westside was appointed, the board never collectively made any decision on behalf of Westside. Rather, Fryar made all decisions, including setting the purchase price for the Cheneyville Property as well as his own fees. As found by the district court, "Fryar fomented and directed the Westside project, and that Fryar, not the board of directors, actually made all important decisions for Westside."

When Fryar was unable to obtain conventional financing for the project, he turned to the possibility of financing through tax-exempt bonds. Fryar enlisted the assistance of Joseph D. Hancock ("Hancock") and his underwriting firm, Hancock, Joseph & Daniels ("HJD") with whom he had previously worked on a similar bond financing for public housing projects in Louisiana. At the time Hancock and HJD were the subject of investigations by the F.B.I., S.E.C. and NASD.

To facilitate the marketing of tax-exempt bonds, Fryar hired Booz, Allen & Hamilton, Inc. ("Booz Allen"), a nationally known consulting firm with extensive experience in evaluating health care facilities in Louisiana, to evaluate the feasibility of the project. Booz Allen concluded that the project was not financially feasible, noting several areas of concern. Despite subsequent consideration of possible solutions, Booz Allen never retracted its concerns regarding the financial structure of Westside. Fryar thereafter threatened Booz Allen with suit because of its adverse conclusions. Booz Allen then agreed to sign

a letter drafted by underwriter's counsel which merely noted that Booz Allen's conclusions may not necessarily still be applicable. The letter did not state that Booz Allen's concerns regarding the financial structure had been ameliorated. Undeterred, Fryar retained a firm with little experience in health care and with no knowledge of the Louisiana Medicaid program from whom he obtained a favorable report.

Fryar continued to encounter other difficulties in effecting his scheme. He initially sought approval from the Louisiana State Bond Commission for the Westside bond issuance. The Commission, however, declined to approve financing for Westside bonds due to, among other things, questions regarding the principals involved, the amount of profit anticipated to inure to the principals, and opposition to the project by officials of the State of Louisiana Department of Health and Human Resources. Still undeterred, Fryar was able to circumvent the Commission by convincing the Town of Cheneyville to approve a bond issuance by Westside in the amount of $12,850,000 pursuant to an obscure and seldom used revenue ruling. Although the town's official records only reflect approval of a bond issuance in the amount of $12,850,000, bonds in the amount of $13,550,000 were issued and the resolution in the closing documents reflects approval of the larger issuance. According to the testimony of the Cheneyville Town Clerk, the resolution was altered.

b. The Property Transaction.

Fryar determined that he would be paid in excess of $5,000,000 to renovate, construct and operate the facility

for an estimated seven months until it became self-sufficient. In addition, Fryar decided to inflate by over $2,300,000 the price to be paid by Westside to purchase the Cheneyville Property he bought for $100,000. Frequently using the mails and wires to communicate messages and transmit documents, Fryar and AA devised a complicated transaction to conceal Fryar's profit and avoid payment by Fryar of taxes on his huge profit. Fryar first sold the Cheneyville Property for $150,000 in late 1981 to AA, his Bermuda corporation. In order to give the transaction a semblance of regularity, the act of sale whereby Fryar sold the property to AA was dated August 21, 1981, notwithstanding that AA had not been organized as of that date. The funds for AA's purchase were obtained from Fryar's underwriting account in a related Bermuda company. AA then resold the Cheneyville Property to Westside for $2,459,700 – $2,000,000 in Westside bonds and the remainder in cash. Retaining its ownership interest in the bonds, AA pledged the bonds to secure Fryar's performance as developer, an obligation undertaken by Fryar pursuant to the development agreement for which he was to be paid $5,000,000. This transaction accomplished several things. First, it concealed from investors the fact that Fryar realized an additional $2,000,000 on the property transaction and would receive substantial tax-free interest payments on the $2,000,000 bonds.[2] The transaction also concealed from investors that Fryar had no money at risk, and, that in fact, the

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[2] As of trial, Fryar and AA had received approximately $900,000 in interest payments on the $2,000,000 bonds.

investors themselves were providing the security for Fryar's performance.

Although Fryar contends that the $2,459,000 was paid to AA for assuming Fryar's obligations under the development agreement, as found by the district court, "[such assertion . . .] is completely belied by the evidence adduced at trial. . . . " The evidence of AA's assumptions of Fryar's obligations for which he was to be paid $5,000,000 was "a *copy* of a resolution, with no available original, which resolution was not produced during discovery and which mysteriously appeared during the course of the trial." Fryar also relied on a handwritten letter from AA's President dated November 24, 1981 as proof of AA's assumptions of his obligations. The trial court questioned the authenticity of this letter, stating:

> The evidence presented by defendants to prove All American's obligations on behalf of Joe Fryar, in consideration for receiving $2,459,000 for a piece of property that cost it only $150,000, was a letter from All American which mysteriously appeared during the course of the trial. The letter was dated November, 1981, wherein All American agreed to buy the property which it had already purchased in August, 1981. . . .

In fact, the trial court found that AA was "organized for the express purpose of concealing that a profit in excess of $2,000,000 was to be made on the sale of the Cheneyville Property."

c. The Bond Issuance.

Fryar proceeded to issue the bonds with the assistance of the other defendants. As found by the Court of

Appeals, the bonds were sold using sales circulars erroneously portraying Fryar as having $2,000,000 at risk. *Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988).

d. Fryar's Operation of Westside.

Fryar thereafter constructed and operated Westside. During Fryar's operation, he submitted reimbursement claims to the State of Louisiana Medicaid program which misrepresented the true cost of the facility, the obligations of Westside and the fact that the bondholders were not being paid the interest owed. As a result of these misrepresentations, Fryar received payments from the State of Louisiana Medicaid program substantially in excess of what should have been paid. More importantly, Fryar pocketed the money paid as reimbursement on debts to the bondholders, thereby profiting personally by an amount in excess of $1,300,000. *Abell v. Potomac Insurance Co.*, 946 F.2d 1160, 1163, n.4 (5th Cir. 1991). Westside's own accountant admitted on cross-examination that such misrepresentations constituted Medicaid fraud.

e. The Litigation.

Fryar's fraud and deceit continued throughout this litigation. During the pretrial discovery proceedings, Fryar and AA attempted to thwart and obstruct these proceedings. For example, although respondents sought for over two years to obtain all documents from AA pertaining to the transaction at issue by subpoenas and requests for production of documents, on the eve of trial

AA produced previously undisclosed copies of documents purporting to be corporate records of AA, correspondence between AA and Fryar, and correspondence between AA and its counsel. The originals of the "new documents" were not produced, notwithstanding the questionable authenticity of the copies.

Fryar's attempt to circumvent the rules went far beyond his "concealment" of documents. He also interfered with the discovery by threatening a witness to dissuade him from testifying. Prior to trial, respondents sought to take the deposition testimony in Bermuda of AA's officer and auditor, Ian Fleming. Mr. Fleming's testimony was critical because AA had consistently produced as representatives persons with no personal knowledge of the transaction at issue. These persons, in fact, testified that Mr. Fleming was more competent to testify in the matters at issue.

Although Mr. Fleming originally agreed to appear for his deposition, he failed to appear. He then moved through an attorney previously representing AA to quash the subpoena requiring his appearance. Mr. Fleming's change of heart resulted from threats by AA to dissuade him from testifying as established by a telex discovered during trial. (A-15). After a two day evidentiary hearing during trial, the trial court held that although the telex came from Bermuda, its probative value was outweighed by the prejudicial effect.

f. Bribery of the Jury.

Fryar's final attempt to thwart justice occurred during the trial when he attempted to bribe two of the jurors.

A little over a month into the trial, the trial judge received information from the F.B.I. that Fryar was attempting to bribe several members of the jury. The judge questioned the F.B.I. agent *in camera*, outside the presence of the defendants and their attorneys, satisfying itself that probable cause existed to believe that Fryar indeed had attempted to bribe two jurors. Prior to charging the jury, the judge excused two jurors.

Fryar's subsequent conviction of eight counts of obstruction of justice was affirmed by the Court of Appeals.[3] More recently, Fryar was convicted of money laundering.[4]

g. The District Court's Judgment.

Following a nine week trial, a jury returned a verdict for the plaintiffs finding Fryar and AA liable for violations of RICO. The trial court entered judgment on February 19, 1987, awarding damages, *inter alia*, in the amount of $2,550,000 for the RICO violations and attorneys' fees in the amount of $2,567,323.80. The trial court thereafter denied Fryar's post-trial motions in a lengthy opinion which thoroughly reviewed the evidence. The trial court held that "[t]he evidence adduced at trial convinces this Court beyond any doubt that the jury's verdict is reasonable." The court stated:

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[3] *U.S. v. Fryar*, No. CR-87-60027-01) (W.D. La. 1988); *U.S. v. Fryar*, 867 F.2d 850 (5th Cir. 1989). (A-1).

[4] *U.S. v. Fryar*, No. CR-89-160 (E.D. La. 1989). (A-17).

The evidence at trial abundantly supported the jury's finding that Fryar violated Section 1962(a) of the RICO Act. It is clear that Fryar and All American derived in excess of $2 million from the pattern of racketeering activity which resulted from the issuance of the Westside bonds. It is also well established that at least $2.4 million of the racketeering monies was used by Fryar and All American to acquire an interest in Westside by the purchase of Westside bonds, and that at least part of the proceeds of that investment, the interest payments, were paid to Fryar, who was operating Westside.

The evidence adduced at trial also supports the reasonableness of the jury's finding that Fryar and All American violated Section 1962(b) of the RICO Act. Fryar and All American used the racketeering monies to acquire over $2 million of Westside bonds. As a result of the scheme, Fryar controlled and operated Westside, during which time he received all revenues paid by the state of Louisiana to Westside, including revenues paid as reimbursement for the interest owed by Westside to plaintiffs. Nevertheless, Fryar refused to pay this interest to plaintiffs. Moreover, the fact that Westside failed to make demand upon Fryar for return of the revenues further indicates that Fryar controlled Westside.

The evidence also abundantly supports the jury's finding that Fryar and All American violated Section 1962(c) of the RICO Act. The evidence discussed above clearly indicates that Fryar and All American participated in the scheme to issue and to market the Westside bonds, within the meaning of Section 1962(c).

On appeal, the Fifth Circuit affirmed the jury's RICO verdict, finding that "evidence strongly supports the jury's RICO verdict."[5] The court explained:

> . . . The record amply supports the jury's conclusion that Fryar, intending to defraud potential investors, devised and employed a scheme to sell Westside bonds. Fryar knowingly misled prospective bondholders about a land transaction that significantly affected Westside's financial structure. He falsely suggested that he had backed the health care project with $2,000,000 of his own money. Obviously, the jury could find that Fryar had a reasonably calculated plan to deceive persons of ordinary prudence and comprehension into giving Westside their money.
>
> Nor does Fryar contest whether he used the mails repeatedly to execute this scheme; indeed, the evidence is overwhelming that he did. Fryar used the mails to obtain and transmit the application forms for Westside's certificate of need; to help create All American and interpose it in the transaction; and to send the land transaction documents to All American. He also caused others to use the mails to transmit the sales circulars that erroneously portrayed Fryar as purchasing and pledging $2,000,000 of bonds with his own money; and finally, he caused the mails to be used in an attempt to cover up the fraud and deceive bondholders into believing

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[5] The court of appeals reversed the judgment in favor of the class on its securities law and state law fraud claims. The court affirmed the jury verdict finding Fryar liable to Abell and Walton individually for violations of § 10(b) of the Securities & Exchange Act. *Abell v. Potomac Insurance Co.*, 858 F.2d 1104, 1147 (5th Cir. 1988).

> All American was performing more obligations than it had actually undertaken.
>
> 858 F.2d at 1130.

The Fifth Circuit also affirmed the RICO damage award in favor of the plaintiff class against Fryar, holding that "the jury awarded plaintiffs considerably less than the damages which they proved at trial." 858 F.2d at 1140.

On March 13, 1989, Fryar filed a Petition for Certiorari to the United States Supreme Court, arguing that plaintiffs failed to establish a pattern of racketeering activity because distinct multiple schemes were not established. On July 3, 1989, the United States Supreme Court granted petitions for certiorari in nine cases, including this one, in which the issue of sufficiency of a pattern of racketeering activity was raised. *Fryar v. Abell*, 492 U.S. 914, 109 S. Ct. 3236 (1989). The Court systematically remanded the nine cases for reconsideration in light of the decision in *H.J. Inc. v. Northwestern Bell Telephone Co., Inc.*, 492 U.S. 229, 109 S. Ct. 2893 (1989) pertaining to the appropriate standard for establishing a pattern of racketeering activity under RICO. *Abell v. Potomac Insurance Co.*, 946 F.2d 1160, 1164 (5th Cir. 1991).

On September 12, 1989, the Court of Appeals remanded the matter to the district court for further consideration in light of *H.J.* and Fryar's pending bankruptcy proceeding. *Abell v. Potomac Insurance Co.*, 884 F.2d 196 (5th Cir. 1989).[6] The plaintiffs moved for

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[6] Fryar commenced a proceeding under Chapter 11 of the United States Bankruptcy Code on May 2, 1989. The

(Continued on following page)

reinstatement of the jury's RICO verdict and the award of attorney's fees, and Fryar moved to dismiss plaintiffs' RICO claims, arguing for the first time that the RICO statute was unconstitutionally vague. (A-20).

The district court granted plaintiffs' motion, upholding the jury's RICO verdict in light of *H.J.* The district court stated:

> In consideration of the principles enunciated in *H.J.*, this Court still holds that the finding of RICO violations is abundantly supported by the evidence. . . . *H.J.* defines a "pattern of racketeering activity" to require a showing of *related* racketeering predicates amounting to or posing a threat of *continued* criminal activity.

The district court rejected Fryar's argument that the RICO statute is unconstitutionally vague.

On appeal, the Fifth Circuit again affirmed the jury's RICO verdict, finding that Fryar's conduct "easily surpassed the RICO threshold". The court explained:

> [T]his Court has already affirmed the judgment for plaintiffs' RICO claims against Fryar for the activities in question, noting that the

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(Continued from previous page)

proceeding was converted to a Chapter 7 proceeding on July 13, 1990. By order dated January 3, 1990, the court granted plaintiffs' motion for relief from stay, permitting them to pursue these claims. Plaintiffs filed an adversary proceeding, alleging that Fryar's debt to Abell, Walton, and the class is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (B), (a)(4) and (a)(6); 523(c) and Bankruptcy Rule 4007. The bankruptcy court has continued the proceeding, pending resolution of Fryar's appeal.

> "evidence *strongly* supports the jury's RICO verdict." 858 F.2d 1130 (emphasis added). *H.J.* has, if anything, resolved rather than revolutionized the law, and the *Fryar* facts have not changed. . . .
>
> *H.J.*'s relatedness and continuity tests are fact-specific and the facts adduced at trial and piled up high against Fryar – some 500 bondholders were cheated out of millions of dollars in a scheme that spread itself out over more than six years – are damning. We have no need to sharpen our pencils for subtle RICO analysis: Fryar's mail fraud violations and the fact that these violations were, as observed by the district court, strung together by the making-money-at-the-expense-of-bondholders objective realized by Fryar are enough. Fryar's conduct has, therefore, easily surpassed the RICO threshold, and we affirm the district court's RICO judgment against him.
>
> 946 F.2d at 1167-68.

The Court of Appeals expressly rejected Fryar's constitutional challenge to the RICO statute, noting that it was untimely and, more importantly, fatally flawed. The court explained:

> In bringing his constitutional contention to us, Fryar is apparently overlooking the principle that 'outside the First Amendment context, a party has standing to raise a vagueness challenge only insofar as the statute is vague as applied to his or her specific conduct.' [Citations omitted.] . . . A myriad of fraudulent acts spanning more than six years and involving more than five hundred victims – based on the evidence adduced at trial, it follows that Fryar's

> *facial* attack on the constitutionality of RICO is simply too superficial to accept.
>
> 946 F.2d at 1167.
> (Emphasis in original).

3. Fryar's Petition for Certiorari.

Fryar now seeks review of the Court of Appeals' decision affirming the reinstatement of the jury verdict finding Fryar liable for violations of RICO. In support of his petition, Fryar asserts three untimely constitutional challenges: (1) the RICO statute is unconstitutionally vague; (2) his due process rights were violated because reconsideration of the jury's verdict in light of *H.J.* somehow constitutes an impermissible application of a substantive change in the law; (3) and his right to a trial by jury was violated by reconsideration of the jury verdict in light of *H.J.* by the district court rather than a jury.

4. Reasons for Denying the Writ.

Fryar has failed to identify any special or important reasons for granting his petition for writ of certiorari. Indeed, no such special or important reasons obtain to this case. No other court of appeals has rendered a decision that conflicts with the decision rendered in the court below. The decision below does not conflict with applicable decisions of this Court. Nor did the decision below decide an important question of federal law which has not been but should be settled by this Court. Indeed, two of the three arguments asserted were not even considered by the Court of Appeals. Hence, this case is inappropriate for review.

More importantly, the Court of Appeals merely found that fraudulent conduct cheating 500 bondholders out of millions of dollars in a scheme that spanned more than six years "easily surpassed the RICO threshold". 946 F.2d at 1168. The decision is correct and should not be reviewed. Further, Fryar's constitutional arguments are untimely and meritless.

5. Fryar's Newly-Raised Constitutional Attacks Cannot be Considered.

Six years after commencement of this case, four years after a nine-week jury trial resulting in a jury verdict in favor of the plaintiffs, and two and one-half years after the Fifth Circuit affirmed the jury's RICO verdict, Fryar asserted for the first time on remand a constitutional attack on the RICO statute. Fryar argued that the RICO statute is unconstitutionally vague requiring dismissal of plaintiffs' RICO claims. Subsequent to the second Court of Appeals' decision, Fryar asserted for the first time on Petition for Rehearing two additional constitutional arguments: (1) retroactive application of *H.J.* violated his due process rights; and (2) reconsideration by the Court rather than a new jury infringed upon his right to trial by jury. Fryar's newly-raised constitutional attacks should not be considered.

It is well established that issues not raised before trial are considered waived and cannot be considered on appeal or remand. *See e.g., Shingleton v. Armor Velvet Corp.*, 621 F.2d 180, 183 (5th Cir. 1980); *Martin Oil Co. v. Gulf Insurance Co.*, 605 F.2d 197, 199 (5th Cir. 1979). In

Glass v. Pfeffer, 849 F.2d 1261 (10th Cir. 1988), the Tenth Circuit has explained:

> [b]y failing to raise a § 1985(2) legal theory before the district court, plaintiffs foreclosed themselves from arguing that theory on appeal *or on remand* . . .
>
> 849 F.2d at 1264.
> (Emphasis supplied).

That the case was remanded with an explicit mandate for reconsideration in light of *H.J.* did not reopen the case for consideration of all issues. As explained by the court below:

> We did not lower a pinata of issues for Fryar to split open, returning to this Court with his arms full.
>
> 946 F.2d at 1165.

The decision below is consistent with other courts of appeals decisions. In *U.S. v. Church*, No. 89-8509, 1992 U.S. App. LEXIS 3931 (11th Cir. 1992), the Eleventh Circuit refused to consider a vagueness challenge to the RICO statute "because appellants failed to raise it in the district court". In *Robinson v. Ariyoshi*, 854 F.2d 1189 (9th Cir. 1988), the Ninth Circuit considered the scope of a remand pursuant to language identical to the language used in remanding this case, and concluded that a remand on one narrow question does not reopen the whole case for reconsideration of all issues, including issues that may have been changed by law in the interim. Rather, upon remand the court may consider only the effect of the Supreme Court's decision and its progeny upon the case before it. *See also Ostrofe v. H.S. Crocker Co.*,

740 F.2d 739, 748 (9th Cir. 1984) (remand required reconsideration in light of *Associated General Contractors* and nothing more); *Minpeco, S.A. v. Hunt*, 724 F. Supp. 259, 260 (S.D.N.Y. 1989) (defendants criticized for first asserting a constitutional challenge to RICO after trial and disposition of post-trial motions).

Ignoring these decisions, Fryar has offered no argument supporting his attempt to have legal issues considered for the first time on remand or on petition for rehearing in the Court of Appeals. Fryar's constitutional attacks are untimely and should not be considered.

6. The RICO Statute is Not Unconstitutionally Vague.

Although the Court of Appeals found Fryar's vagueness argument untimely it, nevertheless, considered and rejected the constitutional attack on the RICO statute. 946 F.2d at 1165-67. The court reasoned that "outside the First Amendment context, a party has standing to raise a vagueness challenge only insofar as the statute is vague as applied to his or her specific conduct". 946 F.2d at 1167. That is, "Fryar would have had to show . . . that the scope of RICO's 'pattern' element was so unclear that a person of ordinary intelligence in Fryar's position would not have had adequate notice that his actions constituted 'a pattern of racketeering activity.' " *Id.* Considering the evidence adduced at trial – "[a] myriad of fraudulent acts spanning more than six years and involving more than five hundred victims" – the court concluded that "Fryar's *facial* attack on the constitutionality of RICO is simply too superficial to accept". *Id.* (Emphasis in original).

The Court of Appeals' decision is consistent with the decisions of the majority of courts which have considered the vagueness argument urged here by Fryar. Since *H.J.*, seven circuits, including the court below, have rejected the argument. In *U.S. v. Van Dorn*, 925 F.2d 1331, 1334 n.2 (11th Cir. 1991) the Eleventh Circuit found defendants' vagueness argument to be "completely lacking in merit." In *U.S. v. Glecier*, 923 F.2d 496, 497-98 n.1 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 54 (1991), the Seventh Circuit rejected a vagueness challenge, noting that "[w]e . . . join the First and Third Circuits in reaffirming that the RICO statute is not unconstitutional despite Justice Scalia's statements concerning the pattern requirement in his concurrence in *H.J.* . . . " In *U.S. v. Tripp*, 782 F.2d 38, 41-42 (6th Cir.), *cert. denied*, 475 U.S. 1128, 106 S. Ct. 1656 (1986), the Sixth Circuit squarely rejected the vagueness argument. In *U.S. v. Coiro*, 922 F.2d 1008, 1017 (2d Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2826 (1991), the Second Circuit reiterated that RICO was not unconstitutionally vague. In *U.S. v. Pungitore*, 910 F.2d 1084, 1102-05 (3rd Cir. 1990), *cert. denied sub nom, Scarfo v. U.S.* ___ U.S. ___, 111 S. Ct. 2009, 111 S. Ct. 2010, 111 S. Ct. 2011 (1991), the Third Circuit rejected a vagueness challenge. In *U.S. v. Angiulo*, 897 F.2d 1169, 1179-80 (1st Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 130 (1990), the First Circuit rejected a vagueness argument. A flood of district court cases likewise have rejected vagueness attacks. *See e.g., U.S. v. Marchese*, No. 89 Cr. 229, 1991 U.S. Dist. LEXIS 4767 (S.D.N.Y. 1991) (rejecting argument that RICO statute is unconstitutionally vague); *Chase Manhattan Bank v. Malatesta*, No. 86 Civ. 1808, 1990 U.S. Dist. LEXIS 9222 (S.D.N.Y. 1990) (rejecting vagueness argument in light of

Supreme Court's recent interpretation of "pattern" and fair warning provided by statutes listed under § 1961(1)); *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 749 F. Supp. 869 (N.D. Ill. 1990) (finding RICO's pattern requirement constitutional); *In Re Crazy Eddie Securities Litigation*, 747 F. Supp. 850 (E.D.N.Y. 1990) (finding the statute constitutional); *In Re Par Pharmaceutical, Inc. Securities Litigation*, 733 F. Supp. 668, 683 n.15 (S.D.N.Y. 1990) (declining to strike down RICO statute).

Fryar has not cited one decision holding to the contrary. Instead, ignoring the numerous decisions squarely rejecting the vagueness argument in a RICO case, Fryar relies heavily on Justice Scalia's dictum in his *H.J.* concurrence and argues that the statute is void on its face. Fryar's reliance is misplaced. Justice Scalia's language seized upon by Fryar does not hold that the RICO statute is unconstitutionally vague. Indeed, Justice Scalia acknowledged that "[n]o constitutional challenge to this law has been raised in the present case, and so that issue is not before us." 109 S. Ct. at 2909. Justice Scalia's comments merely are dictum.

More importantly, Fryar's facial challenge to the RICO statute ignores the well-established principle recognized by the Court of Appeals that outside the First Amendment context, a facial challenge to a statute will not lie.[7] Rather, the vagueness challenge must be limited

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[7] Fryar also argues without authority that in a civil action suit the RICO statute must be considered a criminal statute. To the contrary, courts, including this one, have held that RICO is not to be judged by criminal standards. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 240, 107 S. Ct. 2332, 2344

(Continued on following page)

to whether the statute is vague as applied to the defendant's conduct. *U.S. v. Pungitore*, 910 F.2d 1084, 1104 (3rd Cir. 1990), *cert. denied sub nom Scarfo v. U.S.*, ___ U.S. ___, 111 S. Ct. 2009, 111 S. Ct. 2010, 111 S. Ct. 2011 (1991) ("outside the First Amendment context, a party has standing to raise a vagueness challenge only insofar as the statute is vague as applied to his or her specific conduct"); *U.S. v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 130 (1990) (in absence of First Amendment considerations, vagueness challenge must be examined in light of a case's particular facts); *see also U.S. v. National On Lelong Chinese Merchants Ass'n*, No. 90 CR 760, 1991 U.S. Dist. LEXIS 2341 (N.D. Ill. Feb. 15, 1991). Thus, the proper inquiry is whether persons of ordinary intelligence would know that Fryar's myriad of criminal offenses at issue here constitutes a pattern of racketeering activity. Fryar has not and cannot establish that the statute failed to give fair notice that *his* conduct was forbidden. A person of ordinary intelligence could hardly not realize that Fryar's repeated use of the mails and wires to knowingly mislead over 500 prospective bondholders about a land transaction that significantly affected Westside's financial structure from which he

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(1987) (rejecting argument that RICO claims were quasi-criminal and not subject to arbitration); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1302-03 (7th Cir. 1987), *cert. denied*, 492 U.S. 917, 109 S. Ct. 3241 (1989) (rejecting the argument that RICO was quasi-criminal in nature); *U.S. v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925, 95 S. Ct. 1121 (1975) (a civil RICO action should not be judged by the criminal standards of constitutional protection).

enriched himself by more than $2,000,000 did not fall within the ambit of RICO. Fryar's constitutional challenge is totally devoid of merit.

7. Fryar's Due Process Rights Were Not Violated.

Fryar argued for the first time in his Petition for Rehearing (A-51) to the Court of Appeals that reconsideration of the jury verdict in light of this Court's decision in *H.J.* constitutes an "impermissible retroactive application of a change of substantive law" violative of his due process rights.[8] Fryar cites no authority for this novel proposition. Moreover, the basic premise of Fryar's argument is faulty – that this Court's decision in *H.J.* constituted a substantive expansive change in the law. (Petition for Certiorari, pp. 35-36). To the contrary, as explained by the Court of Appeals:

> *H.J.* has, if anything, resolved rather than revolutionized the law . . .
>
> 946 F.2d at 1167.

Fryar, nevertheless, argues that this Court's decision in *H.J.* expanded the parameters of RICO. Fryar's argument turns logic on its head. *H.J.*, if anything, casts a significantly smaller net over RICO defendants than under *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), the prior Fifth Circuit precedent under which proof of only two predicate acts established a pattern of

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[8] The Court of Appeals specifically identified the three questions of law before it on appeal. 946 F.2d at 1165. Conspicuously absent from the list are Fryar's due process and Seventh Amendment arguments asserted here.

racketeering activity. *H.J.*, thus, narrowed and clarified the statute rather than expanded it. No authority has been found supporting the proposition that application of a decision clarifying and narrowing of a statute violates due process.[9] Indeed, courts have rejected Fryar's argument where judicial expansion of a statutory construction occurs if such construction is expected and defensible. *U.S. v. Martino*, 648 F.2d 367 (5th Cir. 1981), *cert. denied sub nom, Lazzara v. U.S.*, 456 U.S. 943, 102 S. Ct. 2007 (1982), *cert. denied*, 456 U.S. 949, 102 S. Ct. 2020 (1982); *U.S. v. Angiulo*, 847 F.2d 956 (1st Cir.), *cert. denied sub nom, Cincotti v. U.S.*, 488 U.S. 852, 109 S. Ct. 138, *cert. denied*, 488 U.S. 928, 109 S. Ct. 314 (1988) (rejecting due process argument where change of construction of RICO statute regarding "enterprise" was foreseeable). If an expected and defensible judicial expansion of a statute may be retroactively applied without violating due process, *a fortiori* judicial narrowing and classification of a statute may be retroactively applied.

Further, acceptance of Fryar's argument does not require review of the decision below. If Fryar's argument is correct, then the law in effect at the time as enunciated

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[9] In contrast, where a decision clearly expands the scope of a criminal statute prohibiting conduct implicating First Amendment values, the decision cannot be applied retroactively. *Marks v. U.S.*, 430 U.S. 188, 97 S. Ct. 990 (1977) (petitioners entitled to jury instructions fashioned under prior case law where decision expanded definition of obscenity); *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697 (1964) (judicial expansion of criminal statute cannot be applied retroactively). The principles of *Marks* and *Bouie* cited by Fryar do not apply to this case involving neither a criminal statute nor First Amendment conduct.

in *R.A.G.S.* must apply. Under *R.A.G.S.*, Fryar's conduct clearly was violative of RICO, as previously found by the Fifth Circuit. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104 (5th Cir. 1988). Further review is not required.

8. Reconsideration by the District Court did not Infringe Upon Fryar's Right to Trial by Jury.

Fryar also argued for the first time in his Petition for Rehearing that reconsideration of the jury verdict in light of *H.J.* by the district court infringed upon his right to a trial by jury, violative of the Seventh Amendment. Fryar's argument is disingenuous and diametrically opposed to Fryar's contentions in the Court of Appeals. Rather than arguing that a jury must reconsider the verdict in light of *H.J.*, in the Court of Appeals Fryar sought to prevent the district court from considering the issues. In a Motion to Recall the order remanding the case to the district court, Fryar argued to the Court of Appeals that "the legality of respondents' civil RICO claims against movant should be decided by this Court *based on the record on appeal*". (A-61). Fryar never requested that the issue be considered by a jury. (A-59). Having so argued that the case should be reconsidered based on the record on appeal, and having failed to request a new trial by jury or to object to entry of the judgment on that ground, Fryar clearly has waived his right to do so. *U.S. v. 1966 Beechcraft Aircraft Model King Air*, 777 F.2d 947 (4th Cir. 1985) (claimants failure to object to district court's resolution of issues constitutes a waiver of right to jury trial).

Further, Fryar's argument rests upon a faulty premise – that every remand for reconsideration of a jury

verdict in light of a subsequent appellate decision requires a remand to the district court for a new trial. To the contrary, as Fryar previously argued the Supreme Court's directive clearly contemplated that "the legality of respondents' civil RICO claims against movant should be decided by this Court *based on the record on appeal.* The resolution of that legal question by this Court will impart finality thereto, except as the Supreme Court may decide to review such a decision on application for a writ of certiorari." (A-61-62). Accordingly, Fryar's right to a jury trial has not been infringed.

CONCLUSION

Fryar's failure to timely urge the arguments offered in his Petition for Certiorari is fatal; the untimely arguments should not be considered. Moreover, the arguments are meritless. The RICO statute as applied to Fryar's fraudulent conduct spanning more than ten years and victimizing over 500 bondholders is not unconstitutionally vague. Consideration of the jury's verdict in light of *H.J.* neither is violative of Fryar's due process rights or

the right to a trial by jury. For these reasons, Fryar's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondents

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joe E. FRYAR, Defendant-Appellant.

No. 88-4200.

United States Court of Appeals,
Fifth Circuit.

March 1, 1989.

Rehearing Denied April 18, 1989.

Clinard J. Hanby, Houston, Tex., J. Minos Simon, Lafayette, La., for defendant-appellant.

John P. Lydick, Asst. U.S. Atty., Joseph S. Cage, Jr., U.S. Atty., John A. Broadwell, Asst. U.S. Atty., Shreveport, La., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before BROWN, JOHNSON and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Appellant, Joe E. Fryar, challenges his conviction following a jury's guilty verdict on eight counts of jury tampering and conspiracy to corruptly influence a jury. We find no error and affirm.

I.

A jury convicted Fryar on eight counts of obstruction of justice, conspiracy, and aiding and abetting under 18

U.S.C. §§ 2, 371, and 1503. The charges stemmed from efforts to bribe three jurors during the trial of a civil case in the United States District Court for the Western District of Louisiana, in which Fryar was a defendant. The government presented evidence that Fryar conveyed bribe offers to two jurors using intermediaries. Two of those intermediaries testified for the prosecution.

On the government's motion, the district court sequestered the jury that was hearing Fryar's jury tampering case in a section of the Holiday Inn in Monroe, Louisiana. Two marshals were stationed in an end room at the head of the staircase; another was positioned in a room at the other end of the jurors' rooms. The drapes in both rooms were open. The marshals also placed yellow cones bearing "No Trespassing" signs at each end of the balcony.

As the jurors chatted in the courthouse jury room on Saturday, January 30, 1988, juror Steven Faulkner stated that a woman had come to his room about 1:30 a.m. Saturday. Several jurors, including Pam Guillot, advised him to report the visit to the marshals. Faulkner said he had told the marshals about the visit that morning, and then clarified his description of the visit. Faulkner, whose room, 250, was three doors down from the guards' command post room, told the other jurors that a young woman had knocked on his motel door the night before looking for a fraternity party. He said he told the woman he knew nothing about the party and closed his door.

While the jurors watched a movie Saturday night in one of the hotel rooms, a dance scene prompted Guillot to ask Faulkner if the dancer looked like the woman who

had come to his room the night before. Deputy Marshal James Rea overheard the remark and asked Guillot what she was talking about; she repeated Faulkner's earlier statements. Rea told two other marshals about the statement, after which the three marshals asked Faulkner to step out of the room. When they asked him which marshal he had told about the visit, Faulkner said he could not remember.

On Sunday morning one of the marshals told Deputy Marshall James Pleicones about Faulkner's statements. Faulkner repeated his story to Pleicones outside the presence of the other jurors. When Pleicones asked which marshal Faulkner had informed, Faulkner first said he had told Pleicones. After Pleicones denied being told, Faulkner said he must have told Deputy Marshal David Murphy. When Murphy also denied being told, Faulkner said he could not remember who he had told but added that juror Guillot would know. Pleicones then talked with Guillot alone, who recounted her jury room conversation with Faulkner but said she did not see Faulkner tell any marshals about the incident.

After the morning break on Monday, February 1, 1988, the district court recessed the trial temporarily to interview the marshals and jurors in chambers. The three marshals on guard duty during the Friday-to-Saturday overnight shift told the court they neither saw nor heard anyone walking on the balcony or knocking on the jurors' doors. The district court then interviewed Faulkner and Guillot separately. Faulkner described the visit and its aftermath again. Guillot confirmed the jury room conversation with Faulkner but stated that she did not think the visit had occurred. Guillot also stated that the Faulkner

incident would not influence her ability to decide the case fairly and impartially. The court did not ask Faulkner whether he still could decide the case fairly and impartially.

The district court then excused Faulkner from the jury over Fryar's objection. The court concluded that Faulkner lied about the visit, had continued to lie in the face of questioning, and thus was not fit to serve as a juror. Alternate juror Eddie Rice took Faulkner's place and eventually became the foreman. The court denied Fryar's motion to remove Guillot from the jury.

The court then interviewed the remaining jurors separately about the incident. Five said they believed the visit had not occurred, five thought it had occurred, and three said they were not sure. All said the Faulkner incident would not affect their impartiality. The court admonished each juror individually not to discuss the interview with the other jurors.

After reconvening, the district court instructed all of the jurors with Fryar's consent to draw no conclusions or inferences from Faulkner's excusal. Fryar moved for a mistrial on grounds that the taint of Faulkner's dismissal persisted because five jurors believed his story about the visit. The court denied this motion and Fryar's renewed motion to excuse Guillot.

Fryar moved for a new trial after his conviction on grounds that the district court had excused juror Faulkner erroneously. During a post-trial hearing on the motion, Fryar presented Karen Gant and her sister, Juanita Woods, in an effort to prove that a woman had knocked on Faulkner's door early Saturday morning.

Gant testified that her sister had told her that a fraternity would be holding a party Friday night, January 29, 1988, in room 254 or 250 at the Holiday Inn in Monroe. She stated that she knocked on three or four doors in the 250-series while looking for the party; one person fitting the general physical description of juror Faulkner opened the door and told her she had the wrong room, according to Gant. She testified that she spoke loudly at the doors, saw no warning signs or open drapes, and saw nothing to distinguish the row of rooms from any other in the hotel.

Deputy Marshal Richard Frandsen also testified during the hearing about the placement of warning signs in the hotel stairwells. Frandsen, who was not on duty that Friday night, said he told each deputy of the sign requirement and, in anticipation of the fraternity party, warned them to be especially watchful Friday night. Frandsen stated that the warning signs were in open view each time he visited the hotel during the jury's sequestration. The district court concluded that Gant did not know for certain which doors she had knocked on that night and denied Fryar's new trial motion.

Following the sentencing and after filing notice of appeal, Fryar moved for release on bond pending appeal and filed a supplement to the motion. The supplement alleged that juror Eddie Rice had failed to disclose a prior conviction for driving while intoxicated after being asked on voir dire whether he had ever been convicted of or pled guilty to a crime. The court, with the parties' consent, treated the supplement as a motion for new trial and ordered a hearing. Rice acknowledged at the hearing that he had pled guilty to a D.W.I. charge in 1987. However,

the court concluded that Rice had mistakenly but justifiably assumed that a D.W.I. conviction was considered a traffic offense rather than a crime, and denied Fryar's motion for new trial. Fryar appeals.

II.

1.

In his first attack, Fryar seeks to portray the alleged visit to Faulkner as an extrinsic influence on a juror regarding a matter pending before the jury, which creates a rebuttable presumption of prejudice to the defendant. *Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954); *United States v. Webster*, 750 F.2d 307, 338 (5th Cir.1984), *cert. denied*, 471 U.S. 1106, 105 S.Ct. 2340, 85 L.Ed.2d 855 (1985). But the Faulkner incident is more properly characterized as juror misconduct given the district court's finding that the purported visit did not happen. As such, we review the district court's actions under the abuse of discretion standard. *See United States v. Dominguez*, 615 F.2d 1093, 1095 (5th Cir.1980); *United States v. Smith*, 550 F.2d 277, 285 (5th Cir.) *cert. denied sub nom. Wallace v. United States*, 434 U.S. 841, 98 S.Ct. 138, 54 L.Ed.2d 105 (1977). Further, the *Remmer* presumption of prejudice does not come into play here even if we assume that the contact occurred because absolutely no evidence suggests that the purported visitor tried to talk to Faulkner about the trial. *See Remmer*, 347 U.S. at 229, 74 S.Ct. at 451; *United States v. Burke*, 496 F.2d 373, 377 (5th Cir.), *cert. denied*, 419 U.S. 966, 95 S.Ct. 229, 42 L.Ed.2d 182 (1974).

Fryar, relying heavily on the testimony of Karen Gant, argues that the district court erred when it concluded that no visit occurred and dismissed Juror Faulkner. We cannot agree that the district court's resolution of this fact issue, based on the conflicting testimony of Faulkner, Gant and the marshals, is "wholly unsupported by the evidence." *See United States v. O'Keefe*, 722 F.2d 1175, 1178 (5th Cir.1983); *United States v. Granza*, 427 F.2d 184, 185 (5th Cir.1970).

Gant's testimony about the incident was imprecise and uncertain. She recalled that she knocked on doors 254 and 250 while searching for the party, yelled or talked loudly through the hotel doors, and stated that a short and sleepy-looking black man answered door 250. She also stated that she saw no warning signs, marshals or open drapes. But Gant, who testified that she was "vague" about the details of her search because she was anticipating the party at the time, repeatedly said she was not sure about particular room numbers.

The district court was entitled to weigh this equivocal testimony against the statements of the marshals on guard duty that night. The marshals stated that (1) they heard and saw no visitors in the hall that night; and (2) the placement of their guard posts – one of which was three doors down from Faulkner's room – made it unlikely that a visitor could escape detection while knocking and yelling at the jurors' doors.

The marshal's testimony supports the distict court's decision to reject Faulkner's testimony. The district court also was entitled to resolve the dispute about whether Faulkner reported the alleged visit to the marshals and

conclude that Faulkner lied about reporting it. The court did not abuse its discretion in concluding that the visit did not occur and that Faulkner had lied.

The district court has the discretion to excuse an untruthful juror. *See Dominguez*, 615 F.2d at 1095; *Smith*, 550 F.2d at 285. Nor did the court exceed its discretion when it evaluated juror Guillot's statements, accepted her pledge of impartiality and refused to excuse her for lack of candor or her contacts with Faulkner. Her conversations with the marshals and the Court related to the Faulkner incident, not to Fryar's case.

Similarly, the scope of an investigation into juror misconduct rests with the court's discretion. *Tillman v. United States*, 406 F.2d 930, 938 (5th Cir.), *vacated on other grounds*, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969). We detect no abuse of that discretion in the court's individual interviews with the jurors and marshals, or in its instruction that the jurors should draw no conclusions from Faulkner's dismissal. Nor do we detect any actual prejudice to Fryar from this incident. All of the remaining jurors affirmed their ability to decide this case impartially; we see no reason to doubt the district court's determination that they were sincere. *See Smith v. Phillips*, 455 U.S. 209, 217 n. 7, 102 S.Ct. 940, 946 n. 7, 71 L.Ed.2d 78 (1982).

We decline Fryar's invitation to presume that this juror misconduct prejudiced Fryar because the misconduct and investigation involved a sequestered jury hearing a jury tampering case. Fryar's reliance on *United States v. Shapiro*, 669 F.2d 593 (9th Cir.1982), is misplaced. In *Shapiro*, the Ninth Circuit held that the district court

should have granted a mistrial after one juror attempted to extort money from a party in return for a favorable verdict. The Ninth Circuit concluded that the entire panel had been tainted because: (1) several jurors' responses to a special voir dire indicated that the jurors had discussed the case among themselves; and (2) the form of the district court's voir dire questioning planted the idea in jurors' minds that out-of-court misconduct by the prosecution or the defendants had prompted the questioning.[1] Given this situation, the Ninth Circuit presumed that the defendants had been prejudiced. *Id.* at 603.

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[1] The Ninth Circuit included this excerpt from the trial transcript:

> THE COURT: Do you have any idea or suspicion about the reason for this questioning of you?
>
> JUROR CHUMLEY: I really hadn't thought about it, but no, I don't. It does make a person wonder. There obviously has to be a reason.
>
> THE COURT: Do you think this questioning has been occasioned by any out-of-court misconduct by the prosecution or any of the defendants?
>
> JUROR CHUMLEY: Now this is what I should have been – normally would have been thinking about during lunch and everything, but we had a large lunch and we have been playing cards and I really had not thought about it.
>
> THE COURT: I am just planting thoughts in your mind, huh?
>
> JUROR CHUMLEY: In a sense, yes.

Shapiro, 669 F.2d at 601. Another juror responded unequivocally that she did believe a party's misconduct had prompted the court's questioning. *Id.* at 602.

Fryar's case does not present such an egregious situation. The district court asked the jurors individually (1) what they had heard about the incident; (2) what inferences they drew from it; and (3) whether it would affect their ability to be fair and impartial. Unlike that court's questions in *Shapiro*, these generic questions do not suggest misconduct by either party.

Similarly, Faulkner's misconduct itself is insufficient to create a presumption of prejudice here. The Fifth Circuit considered *Shapiro* in a case in which a juror announced in the jury room before closing arguments had ended that the defendants "were guilty from day one [and] that he . . . wasn't listening to the argument." *Webster*, 750 F.2d at 336. The court dismissed the offending juror, interviewed the remaining jurors individually and concluded that they had not been tainted. *Id.* at 337. In refusing to adopt *Shapiro's* presumption of prejudice in these circumstances this court stated:

> [S]itting as we do far from the daily rigors of trial, we are in a particularly inappropriate position from which to judge the effect of a juror's premature expression of an opinion as to guilt on the minds of the other members of the jury panel. That is precisely why we have traditionally left the manner of handling jury misconduct to the sound discretion of the trial judge.

Webster, 750 F.2d at 338 (citations omitted). This reasoning applies with equal force to Fryar's situation.

Finally, Fryar asks us to find prejudice in the marshals' interviews with Faulkner and Guillot on Saturday

and Sunday. Once again we perceive no abuse of discretion in the district court's refusal to grant a new trial based on these contacts. *See United States v. Albert*, 595 F.2d 283, 290 (5th Cir.), *cert. denied*, 444 U.S. 963, 100 S.Ct. 448, 62 L.Ed.2d 375 (1979). We also note that Fryar has waived any argument to excuse Guillot based on the contacts with marshals because he made no motion below to excuse her on these grounds.

2.

Fryar argues that juror Eddie Rice's failure to disclose on voir dire a prior conviction for driving while intoxicated denied him the right to an impartial jury. We review the district court's refusal to grant a new trial on these grounds for abuse of discretion. *United States v. Fowler*, 735 F.2d 823 (5th Cir.1984).

At the post-trial hearing Rice admitted that he had pled guilty to a D.W.I. charge in 1987. However, he stated that he did not remember hearing the question about prior convictions when the district court asked it generally of the jurors. Rice also stated that if he had heard the question he would have considered D.W.I. to be a mere traffic violation rather than a "crime;" he added that his lawyer told him it counted as a traffic violation.

The court concluded that Rice probably heard the question but did not purposely answer it untruthfully. The court noted a possible source of Rice's confusion in its colloquy with another juror; when that juror asked if traffic violations counted as "crimes," the court responded that speeding was not a crime. Under these facts we perceive neither an abuse of discretion by the

district court nor any reason to presume bias to Fryar from Rice's inaccurate answer. *See United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir.1976). Thus, we find no merit in Fryar's companion argument that Rice's inaccurate answer impaired Fryar's ability to exercise his peremptory challenges.

3.

In his next point, Fryar claims that the district court improperly excluded evidence of prior grand jury testimony during his cross-examination of Richard Davis, who testified for the government under a grant of immunity. Davis testified that Fryar asked him to find a way to contact three jurors and get them to vote in Fryar's favor in the civil case. During an offer of proof outside the jury's presence, Davis stated that he had testified before grand juries in 1960, 1972 and 1983 or '84; he testified under a grant of immunity at the 1972 grand jury appearance. The district court, finding that the potentially-prejudicial effect of the testimony exceeded its probative value, excluded the testimony under Fed.R.Evid. 403.

The scope of cross-examination and its limits rest with the district court's discretion. *United States v. Balliviero*, 708 F.2d 934, 940 (5th Cir.), *cert. denied*, 464 U.S. 939, 104 S.Ct. 351, 78 L.Ed.2d 316 (1983). Fryar argues that Davis' prior grand jury appearances were crucial to his theory that Davis acted on his own in trying to bribe the jurors because he knew he could make a deal with the government if he got into trouble. We find no abuse of discretion in the court's conclusion that the danger of prejudice from evidence of a fifteen-year-old grant of

immunity and two unrelated grand jury appearances dating back twenty-eight years outweighed the probative value. This history provides no significant support to Fryar's argument that the government would approve future grants of immunity.

4.

Finally, Fryar claims that the district court infringed his sixth amendment right to confront witnesses when it denied his request to reveal a confidential informant's identity.

Under *Roviaro v. United States*, 353 U.S. 53, 62, 77 S.Ct. 623, 628, 1 L.Ed.2d 639 (1957), courts must make disclosure decisions by balancing the individual's right to prepare a defense against the public interest in encouraging the flow of information from informants by preserving their anonymity. In applying this test, this court has held that *Roviaro* does not require the disclosure of the identities of "mere tipsters." *United States v. Fisher*, 531 F.2d 783, 787 (5th Cir.1976); *see also United States v. De Los Santos*, 810 F.2d 1326, 1334-35 (5th Cir.) (informant's privilege overrides sixth amendment right to confrontation), *cert denied*, ___ U.S. ___, 108 S.Ct. 490, 98 L.Ed.2d 488 (1987).

After reviewing the sealed F.B.I. documents included in this record and the edited transcript from the civil trial hearing at which the F.B.I. first brought the information to light, we conclude that the informant was a tipster. The

district court did not err in denying disclosure of the tipster's identity.

The court's judgment of conviction is

AFFIRMED.

EXHIBIT 3

TO MAX RE: FLEMING

THE TRIAL IS A CIVIL ACTION AND OCCURS ON DECEMBER 1, 1986. IT IS NOT CRIMINAL – FLEMING DOES NOT HAVE TO TESTIFY AND SHOULD NOT.

FLEMING SHOULD RESIST BEING DEPOSED. HARGAN IS ACQUAINTED WITH THE CASE AND SHOULD REPRESENT HIM. THE FOLLOWING POINTS ARE MADE:

1. A.A. IS AN EXEMPT COMPANY AND SHOULD BE PROTECTED BY BERMUDA'S SECRECY LAWS.

2. FLEMING HAS A DUTY AND OBLIGATION OF CONFIDENTIALITY REGARDING HIS CLIENTS BUSINESS AND RECORDS.

3. FLEMING HAS NO RIGHT TO POSSESS ANY ORIGINALS, COPIES, CORRESPONDENCE, RECORDS OR RECOLLECTIONS PERTAINING TO A.A. AND SHOULD IMMEDIATELY SURRENDER ANY THAT HE HAS TO THE COMPANY AND FORGET ANYTHING THAT HE RECALLS.

4. TESTIMONY RELATIVE TO FUNDING A.A. VIA ANGLO AND FRYAR'S INVOLVEMENT WITH ANGLO WOULD BE VERY DAMAGING TO A.A.'S EFFORTS TO RECOVER THE BONDS.

5. ANY LOSS THAT A.A. SUFFERS BECAUSE OF FLEMING'S RECORDS, TESTIMONY OR VIOLATING THE CONFIDENTIALITY OF A.A.'S BUSINESS WILL CAUSE A.A. TO

SEEK ECONOMIC RECOVERY VIA LEGAL ACTION AGAINST FLEMING.

6. IF HE AVOIDS BEING DEPOSED OR UPON BEING DEPOSED, RESPECTS THE CONFIDENTIAL RELATIONSHIP BETWEEN HIMSELF AND A.A., THEN HE CAN EXPECT TO RETAIN A GOOD AND GENEROUS CLIENT. BUT IF HE DIVULGES OUR BUSINESS, THEN IT WILL BE INCUMBENT ON A.A. THRU THE COURTS TO LET HIS PRESENT AND FUTURE CLIENTS KNOW THE LOOSENESS WITH WHICH THEIR BUSINESS DEALINGS ARE HANDELED [sic]. THIS WILL HARDLY INSPIRE CONFIDENCE IN CLIENTS OF FLEMING.

J. H. SMITHERS

89-160

CRIMINAL DOCKET

TITLE OF CASE

THE UNITED STATES

vs.

MICHAEL WAYNE BOUDREAUX	(CTS. 1 - 14)
JOSEPH E. FRYAR	(CTS. 7 - 11)
MALCOLM ZIEGLER	(CTS. 7 - 11 & 14)
LUTHER RICHARDSON, JR.	(CTS. 7, 9, 11)
Super. Indict.- LEO FONTENOT	(CT. 7)
THOMAS M. BOUTWELL	
RORY HARRIS	

REPORT CURRENCY TRANSACTIONS

18:371 Ct. 7

18:1956(a)(3) Cts. 8 & 9

18:2 Cts. 8 - 11 & 14

31:5313(a) Cts. 1 - 6 & 10 - 14)

31:5322(b) Cts. 1 - 6 & 10 - 14)

31:5324(3) Cts. 2, 4, 6 & 13)

31:5324(1) Cts. 10 & 11

31CFR 103.22 Cts. 1-6 & 10 - 14)

31CFR 103.25 Cts. 1-6 & 10-14)

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For: Richardson

ADDL ATTYS CO:

CASH RECEIVED AND DISBURSED

DATE
MONDAY, OCTOBER 30, 1989
9:30 AM

Courtroom Deputy: Pam Radosta
Court Reporter – Tom Conrad

ARRAIGNMENT ON 4th SUPERSEDING INDICTMENT (DEFT. JOSEPH FRYAR)

Deft. present to Plea Guilty as to **COUNTS 2 AND 6** of the 4th Superseding Indictment.

Deft. Sworn and questioned by the court.

Deft. informed of rights to trial by jury or the court and waives same.

4th Superseding Indictment (Cts 2 & 6) read to the deft. by the court.

Deft. informed of the maximum penalties.

Deft. informed of sentence guidelines.

Deft. enters a plea of Guilty.

Plea Bargain disclosed to the court in letter form and same is filed.

Government states the facts of the case to the court.

Plea Accepted and deft. is Adjudged Guilty on plea of Guilty.

Pre-sentence investigation ORDERED.

Deft. remanded

DATE OF ENTRY NOV 02 1989

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

EDWARD C. ABELL, JR., and CAREY WALTON, ET AL	CIVIL ACTION
VERSUS	NUMBER: 84-1786 "O"
POTOMAC INSURANCE COMPANY, ET AL	(JUDGE SHAW)
	(MAGISTRATE METHVIN)

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS CIVIL RICO CLAIMS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR ORDER UPHOLDING JURY VERDICT, READJUSTING ATTORNEYS' FEE AWARD, AND RECALCULATING INDIVIDUAL PLAINTIFFS' DAMAGE AWARD

MAY IT PLEASE THE COURT:

(I). STATEMENT OF THE CASE

This Court has granted defendant **Joe E. Fryar** until **Monday, May 7, 1990,** to provide it with his pleadings and memoranda directed to the issues raised by the United States Court of Appeals for the Fifth Circuit's remand of the above captioned civil action for further proceedings in light of ***H.J. Inc. v. Northwestern Bell Telephone Company,*** **492 U.S. ___, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989).** Defendant has responded by filing

simultaneously herewith a motion to dismiss the civil RICO claims asserted against him by the plaintiff-class of bondholders in **Westside Rehabilitation Center** (plaintiffs). Defendant submits this memorandum in support of his motion to dismiss and in opposition to plaintiffs' motion for order upholding jury verdict, readjusting attorneys' fee award, and recalculating individual plaintiffs' damage award.

Defendant's motion to dismiss sets forth the tortured procedural history of this case in detail, as well as the grounds relied upon for the relief he seeks. Succinctly stated, defendant alleges that this Court should find that **18 U.S.C. §§ 1961, et. seq.**, violates the procedural due process guarantee of **U.S.C. Const. Amend. 5** that appropriate notice of a proscription must be given before a person can be held accountable for its violation. Alternatively, defendant alleges that this Court should find that **18 U.S.C. §§ 1961, et. seq.**, does not reach the isolated and sporadic criminal acts shown by respondents in this case. Thereafter, based on either of these findings, this Court should dismiss the civil RICO claims asserted by plaintiffs against defendant.

(II). LAW AND ARGUMENT

(A). 18 U.S.C. §§ 1961, ET. SEQ., IS VOID FOR VAGUENESS

Defendant initially contends that **18 U.S.C. §§ 1961, et. seq.**, violates one of the procedural due process guarantees emanating from **U.S.C. Const. Amend. 5,** i.e., appropriate notice of a proscription must be given before

a person can be held accountable for its violation. Plaintiffs' civil RICO claims asserted against defendant arise under **18 U.S.C. §§ 1961, et. seq.** In particular, plaintiffs rely on **18 U.S.C. § 1964(c)**, which provides:

> **"§ 1964. Civil remedies**
>
> (c) ***Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court*** and shall recover ***threefold the damages he sustains*** and the cost of the suit, including a reasonable attorney's fee." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Consequently, plaintiffs alleged and attempted to prove that defendant violated **18 U.S.C. "§ 1962**, which provides:

> **"§ 1962. Prohibited activities**
>
> (a) ***It shall be unlawful for*** any person who has received any income derived, directly or indirectly, from ***a pattern of racketeering activity*** or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another

to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer. (b) ***It shall be unlawful for*** any person through ***a pattern of racketeering activity*** or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) ***It shall be unlawful for*** any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate,directly or indirectly, in the conduct of such enterprise's affairs through ***a pattern of racketeering activity*** or collection of unlawful debt.

(d) ***It shall be unlawful for*** any person ***to conspire to violate*** any of the provisions of subsection (a), (b), or (c) of this section." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Based on this statutory language, **18 U.S.C. §§ 1962** and **1964** render civilly liable "any person" who uses or invests income derived "from a pattern of racketeering activity" to acquire an interest in or to operate an enterprise engaged in interstate commerce, **18 U.S.C. § 1962(a);**

who acquires or maintains an interest in or control of such an enterprise "through a pattern of racketeering activity," **18 U.S.C. § 1962(b);** who, being employed by or associated with such an enterprise, conducts or participates in the conduct of its affairs "through a pattern of racketeering activity," **18 U.S.C. § 1962(c);** or, finally, who conspires to violate the first three subsections of **18 U.S.C. § 1962, 18 U.S.C. § 1962(d).** RICO provides for drastic remedies: conviction for a violation of RICO carries severe criminal penalties and forfeiture of illegal proceeds, **18 U.S.C. § 1963;** and a person found in a private civil action to have violated RICO is liable for treble damages, costs, and attorney's fees, **18 U.S.C. § 1964(c).**

The essential elements a plaintiff must prove to establish a civil RICO claim depend upon which subsection of **18 U.S.C. § 1962** the plaintiff is alleging the defendant violated. However, the well-settled jurisprudence establishes that there are certain essential elements common to all civil RICO claims. The district court in ***Occupational-Urgent Care Health Systems, Inc. v. Sutro & Company, Inc.,*** 711 F. Supp. 1016 (E.D. Ca. 1989), noted the essential elements common to all civil RICO claims, when it held:

> "The precise requirement for establishing a civil RICO cause of action depends on which subsection of the statute a plaintiff invokes; however, ***the following are essential elements of any civil RICO action***: ***(1)*** the existence of a RICO 'enterprise' ***(2) the existence of a 'pattern of racketeering activity'; (3)*** a nexus between the defendant and either the pattern of racketeering activity or the RICO 'enterprise'; and

> *(4)* resulting injury to plaintiff, in his 'business or property.' See [citations omitted]." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 1021.

See also ***Klapper v. Commonwealth Realty Trust,*** 657 F.Supp. 948 (D. Del. 1987); and, ***Eaby v. Richmond,*** 561 F.Supp. 131 (E.D. Pa. 1983).

Thus, it is essential to the proscriptions of **18 U.S.C. §§ 1961, et. seq.,** to determine what is meant by a **"pattern of racketeering activity".** A defendant may not be held civilly or criminally liable under **18 U.S.C. §§ 1961, et. seq.,** unless a "pattern of racketeering activity" can be shown to exist. **18 U.S.C. § 1961(5)** purports to define this essential element of a "pattern of racketeering activity":

> **§ 1961. Definitions**
>
> As used in this chapter –
>
> (5) ***"pattern of racketeering activity" requires at least*** two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; . . . ". (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Clearly, **18 U.S.C. § 1961(5)** does not set forth a definition or notice of what constitutes a "pattern of racketeering activity." Instead, the statute *only* sets forth a minimum necessary condition for the existence of such a pattern. **18 U.S.C. §§ 1961, et. seq.,** does *not* contain any

other provision relating to the essential element of a "pattern of racketeering activity."

> **U.S.C. Const. Amend. 5** provides:**"Amendment 5 – Grand jury indictment for capital crimes; Double jeopardy; Self-incrimination; Due process of law; Just compensation for property**
>
> ***No person shall*** be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor ***be deprived of life, liberty, or property, without due process of law;*** nor shall private property be taken for public use, without just compensation." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

As such, **U.S.C. Const. Amend. 5** guarantees to defendant the right not to be deprived of his property without due process of law. This guarantee of procedural due process includes the requirement that defendant be given appropriate notice of the proscriptions of **18 U.S.C. §§ 1961, et. seq.**, before he can be held accountable for violating those statutes. The fact that plaintiffs are proceeding under the civil provisions of **18 U.S.C. §§ 1961, et. seq.**, is of no moment, as the aforementioned procedural due process guarantee applies to civil statutes as well criminal statutes.

The Supreme Court in ***A. B. Small Company v. American Sugar Refining Company,*** 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 589 (1925) *affirmed* a district court's judgment, which held certain portions of the Lever Act regulating profits made on the sale of certain necessaries such as sugar to be unconstitutional. In particular, the district court found that those sections which utilized terms such as "unjust", "unreasonable" and "excessive" in describing prohibited transactions were unconstitutionally vague. On Writ of Error to the Supreme Court, the defendants argued that the void-for-vagueness doctrine applied only to criminal statutes and thus could not be used to invalidate the civil statute at issue. ***A. B. Small Company,*** supra, rejected the defendants' arguments, holding:

> ***"The defendant attempts to distinguish those cases because they were criminal prosecutions.*** But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.***It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.*** Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. ***They have been so construed and applied by other courts in civil proceedings.*** [citations omitted]. In the first of these citations, the Court of Appeals of New York, referring to this court's ruling in the Cohen Grocery Co. Case, well said:

> *'The ground on which it placed its judgment applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established.* * * * The variant views of judges of the District Courts were quoted as evidence of the absence of a standard. If this is the rationale of the decision, its consequences are not limited to criminal prosecutions.*A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty.'*

Id. 45 S.Ct., at p. 297.

See also *Giaccio v. State of Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966); *Jones v. City of Lubbock,* 727 F.2d 364 (5th Cir. 1984); *Exxon Corporation v. Busbee,* 644 F.2d 1030 (5th Cir. 1981); and, *Leonen v. Johns-Manville Corporation,* 717 F.Supp. 272 (D. N.J. 1989).

The standards for evaluating vagueness were enunciated by the Supreme Court in *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). In that case, the Supreme Court upheld an anti-noise ordinance against a challenge that it was unconstitutionally vague. However, in discussing the principles underlying the void-for-vagueness doctrine, *Grayned,* supra, held:

> "The anti-noise ordinance reads, in pertinent part, as follows:
>
> . . .

Appellant claims that, on its face, this ordinance is both vague and overbroad, and therefore unconstitutional. We conclude, however, that the ordinance suffers from neither of these related infirmities.

A. Vagueness

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, ***we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.*** Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. ***A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.*** Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' ***Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.' "*** (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 92 S.Ct., at pp. 2298 and 2299.

See also ***Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,*** 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); ***Papachristou v. City of Jacksonville,*** 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); ***United States v. Professional Air Traffic Controllers Organization,*** 678 F.2d 1 (1st Cir. 1982); and, ***Postscript Enterprises, Inc. v. Whuley,*** 658 F.2d 1249 (8th Cir. 1981).

Similarly, in ***DiLeo v. Greenfield,*** 541 F.2d 949 (2nd Cir. 1976), the United States Court of Appeals for the Second Circuit noted the constitutional requirement of adequate, prior warning of prohibited behavior, holding:

> ***"The notion of due process requires that sanctions be imposed on individuals only if they could reasonably have known in advance that their questioned behavior had been proscribed.*** In accordance with this principle, the Supreme Court has held that a statute may be void for vagueness in order to ensure that individuals are fairly apprised in advance regarding the specific conduct which the legislature has prohibited. See [citations omitted]. DiLeo contends that the Connecticut statute which authorized his dismissal for "other due and sufficient cause" failed sufficiently to inform him of the kind of conduct which is proscribed. We disagree.
>
> We do not agree with the district court that vagueness in the statute could be cured by subsequent explanation by the Board of which acts it charged as falling within the scope of § 10-151(b)(6). ***Due process requires prior notice of what constitutes forbidden behavior.*** See [citation omitted]." (Emphasis added). (COPR.

(C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. p. 953.

The Supreme Court in ***Federal Communications Commission v. American Broadcasting Company, Inc., et al,*** 347 U.S. 284, 74 S.Ct. 593, 98 L.Ed. 699 (1954), had occasion to construe certain statutes that, like the RICO statutes, provided both civil and criminal penalties for their violation. In that case, the Supreme Court rejected the FCC's contention that the statutes could be broadly construed in the civil context, but narrowly construed in the criminal context. ***Federal Communications Commission,*** supra, held:

> ***"It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice.*** If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also ***it would do violence to the well-established principle that penal statutes are to be construed strictly."*** (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 74 S.Ct., at pp. 600-601.

In his dissent in ***H.J., Inc.,*** Justice **Scalia** cites ***Federal Communications Commission,*** supra, for the proposition that RICO, since it has criminal applications, must, even

in its civil applications, possess the degree of certainty required for criminal laws. Thus, a court may not broadly construe RICO's provisions in the civil context, but then narrowly construe those same provisions in the criminal context. As a penal statute, RICO is to be strictly construed whatever its meaning.

The United States Court of Appeals for the Fifth Circuit in ***Exxon Corporation,*** supra, noted that the void-for-vagueness doctrine is most rigorously applied in the context of penal statutes. On this issue, ***Exxon Corporation,*** supra, held:

> ***"While it is true that the void-for-vagueness doctrine is most rigorously applied in the context of penal statutes,*** [citation omitted], and in the area of first amendment rights, [citation omitted], the Supreme Court has recognized that ***"(v)ague laws in any area suffer a constitutional infirmity."*** [citations omitted]." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 1033.

The holdings of ***Federal Communications Commission,*** supra, and ***Exxon Corporation,*** supra, are important because the United States Court of Appeals for the Fifth Circuit has recognized in the case *sub judice* that the civil RICO statutes are penal in nature. On this point, ***Abell, et al v. Potomac Insurance Company, et al,*** 858 F.2d 1104 (5th Cir. 1988), rehearing en banc denied 863 F.2d 882 (5th Cir. 1988), held:

> ***"We hold that the portion of RICO damages in excess of actual damages is penal.*** Those added damages are "not limited to the damages

suffered"; ***they seem more designed to deter than to compensate.*** As Congress constructed them, the civil provisions of RICO compensate primarily victims of fraud or fraudulent schemes. Had Congress merely wanted to make whole this new class of plaintiffs, it would have limited civil RICO damages to the actual damages commonly available to fraud victims.

However, in promulgating RICO, Congress expressly found that the problem of racketeering was primarily public, not private, including draining resources from the economy, subverting the democratic process, and undermining the general welfare, [citations omitted]. ***We conclude, therefore, that Congress trebled RICO damages as as [sic] part of this overall attack on the public wrongs of organized crime."*** (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. p. 1141.

Under this well-settled jurisprudence, a statute can neither forbid nor require "the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Stated another way, no statute may exact "obedience to a rule or standard so vague and indefinite as really to be no standard at all." In enacting **18 U.S.C. §§ 1961, et. seq.**, The Congress was required to adhere to these requirements of procedural due process.

18 U.S.C. § 1961(5) purports to define the essential element of "pattern of racketeering activity" found in **18 U.S.C. § 1962(a), (b)** and **(c)**, but this subsection does nothing more than set forth a minimum requirement

therefor, i.e., "two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." Nowhere in **18 U.S.C. §§ 1961, et. seq.**, is any further definition or guidance given with respect to the meaning of "pattern of racketeering activity."

This constitutional defect existing in **18 U.S.C. §§ 1961, et. seq.**, was recognized by Justice **Scalia**, in his concurring opinion in ***H.J. Inc.***, supra, wherein he stated:

> ***"Four terms ago, in [citation omitted], we gave lower courts the following four clues concerning the meaning of the enigmatic term "pattern of racketeering activity" in the Racketeer Influenced and Corrupt Organizations Act*** (RICO or the Act), [citation omitted]. ***First,*** we stated that the statutory definition of the term in 18 U.S.C. § 1961(5) implies "that while two acts are necessary, they may not be sufficient." [citation omitted]. ***Second,*** we pointed out that "two isolated acts of racketeering activity," "sporadic activity," and "proof of two acts of racketeering activity, without more" would not be enough to constitute a pattern. [citation omitted]. ***Third,*** we quoted a snippet from the legislative history stating "[i]t is this factor of continuity plus relationship which combines to produce a pattern." [citation omitted]. ***Finally,*** we directed lower courts' attention to [citation omitted], which defined the term "pattern of conduct which was criminal" used in a different title of the same Act, and instructed them that "[t]his language may be useful in interpreting other sections of the Act," [citation omitted]. ***Thus enlightened,***

the district and circuit courts set out "to develop a meaningful concept of 'pattern,'" [citation omitted], and promptly produced the widest and most persistent circuit split on an issue of federal law in recent memory, see, e.g., [citation omitted]. Today, four years and countless millions in damages and attorney's fees later (not to mention prison sentences under the criminal provisions of RICO), *the Court does little more than repromulgate those hints as to what RICO means, though with the caveat that Congress intended that they be applied using a "flexible approach." [citation omitted].*

. . .

Thus, when **18 U.S.C. §§ 1961(5)** says that a pattern "requires at least two acts of racketeering activity" *it is describing what is needful but not sufficient.* (If that were not the case, the concept of 'pattern' would have been unnecessary, and the statute could simply have attached liability to 'multiple acts of racketeering activity.') *But what that something more is, is beyond me. As I have suggested, it is also beyond the Court.* Today's opinion has added nothing to improve our prior guidance, which has created a kaleidoscope of circuit positions, except to clarify that RICO may in addition be violated when there is a "threat of continuity." *It seems to me this increases rather than removes the vagueness.* There is no reason to believe that the Courts of Appeals will be any more unified in the future, than they have in the past, regarding the content of this law.

That situation is bad enough with respect to any statute, but it is intolerable with respect

> *to RICO.* For it is not only true, as Justice Marshall commented in [citation omitted], that our interpretation of RICO has "quite simply revolutionize[d] private litigation" and "validate[d] the federalization of broad areas of state common law of frauds," [citation omitted], so that clarity and predictability in RICO's civil applications are particularly important; ***but it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws, [citation omitted]. No constitutional challenge to this law has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented."*** (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. 109 S.Ct. at 2906 through 2909.

Similarly, the majority in *H.J., Inc.*, supra, virtually conceded the constitutional infirmities existing in **18 U.S.C. §§ 1961, et. seq.**, when it held:

> ***"The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists.*** The development of these concepts must await future cases, absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope."

(Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 109 S.Ct., at p. 2902.

Certainly, if the justices of the Supreme Court, the circuit judges sitting on the various Courts of Appeals and the district court judges are unable to discern the meaning of "pattern of racketeering acitity" from **18 U.S.C. §§ 1961, et. seq.**, then men of common intelligence must necessarily guess at its meaning and differ as to its application. As such, **18 U.S.C. §§ 1961, et. seq.**, violates the procedural due process guarantee of **U.S.C. Const. Amend. 5** that appropriate notice of a proscription must be given before a person can be held accountable for its violation. In particular, **18 U.S.C. §§ 1961, et. seq.**, forbids "the doing of [acts] in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Stated another way, **18 U.S.C. §§ 1961, et. seq.**, exacts "obedience to a rule or standard so vague and indefinite as really to be no standard at all."

For these reasons, this Court should find that **18 U.S.C. §§ 1961, et. seq.**, violates the procedural due process guarantees of **U.S.C. Const. Amend. 5**, and it should dismiss plaintiffs' civil RICO claims asserted against defendant under those statutes.

(B). PLAINTIFFS FAILED TO PROVE ANYTHING MORE THAN "ISOLATED" AND "SPORADIC" CRIMINAL ACTS

Alternatively, defendant contends that plaintiffs failed to prove "a pattern of racketeering activity" under

the specific facts of this case, as that essential element is vaguely defined in ***H.J. Inc.,*** supra. In particular, plaintiffs failed to produce any evidence of racketeering activities engaged in by defendant that amounted to or threatened long-term criminal activity, i.e., the "continuity" requirement for proving the existence of a "pattern of racketeering activity". Instead, plaintiffs were only able to show that defendant engaged in isolated and sporadic criminal acts related to the Westside bond offer. Plaintiffs were thus unable to establish the "continuity" requirement for a "pattern of racketeering activity", which requirement was described by the Supreme Court in ***H.J., Inc.,*** supra, as racketeering activities that amount to or threaten long-term criminal activity. Plaintiffs' failure to prove "continuity" was memorialized by the Court of Appeals in ***Abell,*** supra, when it held:

> "Fryar also contends that RICO requires plaintiffs to prove at least two related predicate acts arising from DISTINCT schemes. See 18 U.S.C. § 1962 (requiring a RICO plaintiff to prove a "pattern of racketeering"). ***Fryar's brief correctly notes that "[p]laintiffs have fashioned their RICO claim from the matrix of their securities law fraud claims."*** From this observation, Fryar concludes that the plaintiffs failed to prove the predicate acts necessary to establish a "pattern of racketeering."
>
> Our cases, however, belie Fryar's legal analysis. In [citation omitted], we held that RICO requires only that the predicate acts alleged be related, not that they arise from separate schemes or incidents. Here, ***plaintiffs have alleged over half a dozen acts of mail fraud and wire fraud, each of which stems from Westside's***

> ***bond offer.*** R.A.G.S. requires no more. But see [citations omitted]. (Each of these cases criticizes R.A.G.S., but notes that only the court sitting en banc or the Supreme Court may overturn R.A.G.S.)." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 1120.

Certainly, a half dozen acts of mail fraud and wire fraud spread over a seven (7) year period (a half dozen racketeering acts occurring between 1976 and 1983 according to plaintiffs) all of which are related to a single, discrete objective which is accomplished do not amount to or threaten long-term criminal activity. Parenthetically, as noted by the Supreme Court in ***H.J., Inc.***, supra, The Congress did not intend that **18 U.S.C. §§ 1961, et. seq.**, reach such isolated and sporadic criminal acts as those shown by plaintiffs in this case. Rather, The Congress intended that the RICO statutes reach long-term criminal activity:

> "Insofar as the concurrence seems to suggest, post, at ___, that very short periods of criminal activity that do not in any way carry a threat of continued criminal activity constitute "obvious racketeer[ing]" to which Congress intended RICO, with its enhanced penalties, to apply, we have concluded that it is mistaken, and that when Congress said predicates must demonstrate "continuity" before they may form a RICO pattern, ***it expressed an intent that RICO reach activities that amount to or threaten long-term criminal activity.***" (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 109 S.Ct., at p. 2902 (footnote 4)

The majority in ***H.J., Inc.,*** supra, began its unsuccessful attempt to define the "continuity" requirement for a "pattern of racketeering activity" by describing the concept and stating what is not sufficient to show that it exists:

> "[sic]***"Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.*** See [citation omitted]. It is, in either case, centrally a temporal concept – and particularly so in the RICO context, where ***what must be continuous, RICO's predicate acts or offenses, and the relationship these predicates must bear one to another, are distinct requirements.*** A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: ***Congress was concerned in RICO with long-term criminal conduct.*** Often a RICO action will be brought before continuity can be established in this way. ***In such cases, liability depends on whether the threat of continuity is demonstrated.*** See [citation omitted]." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 109 S.Ct., at 2902.

The majority in ***H.J., Inc.,*** supra, then proceeded to give examples of those situations it believed would show that "continuity" was present in a given case:

"Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case. Without making any claim to cover the field of possibilities – preferring to deal with this issue in the context of concrete factual situations presented for decision – we offer some examples of how this element might be satisfied. *A RICO pattern may surely be established if the related predicates themselves involve a distinct threat of long-term racketeering activity, either implicit or explicit.* Suppose a hoodlum were to sell "insurance" to a neighborhood's storekeepers to cover them against breakage of their windows, telling his victims he would be reappearing each month to collect the "premium" that would continue their "coverage." Though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves include a specific threat of repetition extending indefinitely into the future, and thus supply the requisite threat of continuity. In other cases, *the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business.* Thus, the threat of continuity is sufficiently established where *the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes.* Such associations include, but extend well beyond, those traditionally grouped under the phrase "organized crime." The continuity requirement is likewise satisfied where it is shown that *the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that*

> ***exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise."*** (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).

Id. 109 S.Ct., at p. 2902.

A study of these examples establishes that the Supreme Court was merely restating the same basic idea throughout, i.e., there must be evidence of racketeering activities that amount to or threaten long-term criminal activity. The impossibility of extracting anything more than this simple core concept from ***H.J., Inc.***, supra, is amply demonstrated by one of the most recent decisions of the United States Court of Appeals for the Fifth Circuit on the civil RICO statutes, i.e., ***Howell Hydrocarbons, Inc. v. Adams***, 897 F.2d 183 (5th Cir. 1990). In that case, the Fifth Circuit ***affirmed*** a district court's summary judgment rendered in favor of the defendants on the ground that the plaintiff had failed to prove the existence of a "pattern of racketeering activity". In noting the plaintiff's failure, ***Howell***, supra, held:

> ***"The Racketeer Influenced and Corrupt Organizations Act, [citation omitted], imposes civil liability on those who engage in certain "prohibited activities," defined as requiring proof of either "a pattern of racketeering activity"*** or "collection of an unlawful debt." [citation omitted]. "Racketeering activity" means any act indictable under various specified federal statutes, and certain federal offenses. [citation omitted]. ***The statute indicates only that a "pattern" "requires at least two acts of racketeering activity" within a ten year period.*** [citation omitted].

A civil RICO claim under [citation omitted] must involve a person who engages in a pattern of racketeering activity connected to the acquisition, establishment, conduct or control of an enterprise. [citations omitted]. ***The Supreme Court has rejected both the view that predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes,*** see [citation omitted], ***and the equally extreme view that a pattern is established merely by proving two predicate acts,*** see, e.g., [citation omitted]. H.J. Inc., [citation omitted]. "While two acts are necessary, they may not be sufficient." [citation omitted].

> RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering activity a plaintiff . . . ***must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.***

[citation omitted]. The Supreme Court further explained this concept of "continuity" as either "a closed period of repeated conduct," or "past conduct that by its nature projects into the future with a threat of repetition." [citation omitted]. But, "predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement." [citation omitted]. The Court provided several examples of activity showing this continuity, all indicating activities that amount to or threaten long-term criminal activity. [citation omitted].

. . .

> ***There has been no indication of activities that amount to or threaten long term criminal activity.*** See [citation omitted]." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 190 and 193.

Thus, at this point in time, this Court has nothing more than the vague concept of "activities that amount to or threaten long term criminal activity" to utilize in determining whether plaintiffs proved that the requirement of "continuity" for the essential element of a "pattern of racketeering activity" existed in this case. The United States Court of Appeals for the Seventh Circuit in ***Sutherland v. O'Malley,*** 882 F.2d 1196 (7th Cir. 1989), described some of the factors it considered relevant to a determination of whether the racketeering activities alleged to exist in a particular case have the "continuity" required to constitute a "pattern of racketeering activity":

> "Ms. Sutherland cannot, however, establish that these predicate acts have the continuity required to constitute a pattern of racketeering activity. ***To satisfy the continuity element, the plaintiff must show that the alleged predicate acts "themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity."*** [citation omitted]. The plaintiff must prove "continuity of racketeering activity, or its threat, simpliciter." [citation omitted]. The Court has not formulated any general test for continuity in the abstract. ***Instead, the specific facts of each case must be examined to determine whether the predicate acts relied upon by the plaintiff establish a threat of continuing racketeering activity.*** [citation omitted].

Courts must examine a number of relevant factors when determining whether the predicate acts alleged are sufficiently continuous to constitute a pattern; *these factors include " 'the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries.' " [citations omitted]* ("The quest for 'continuity plus relationship' necessarily involves a fact-specific analysis."); [citation omitted]. The Supreme Court in [citation omitted] also explained, however, that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement: *Congress was concerned in RICO with long-term criminal conduct.*" [citations omitted] ("Our cases demonstrate an expansive reading of civil RICO, *but only where a true 'pattern' of prohibited activity, not just sporadic or isolated instances of fraud, are shown.*"); [citation omitted] (*continuity requirement not satisfied where case "involves the type of 'isolated event' that fails to manifest the threat of continuing illegal activity indicative of a 'pattern' of racketeering activity*").

In light of these standards, we conclude that Mr. O'Malley's allegedly wrongful conduct does not satisfy the pattern requirement's continuity element. *While a RICO pattern can be established, in some circumstances, by proof of a single scheme, it is not irrelevant, in analyzing the continuity requirement, that there is only one scheme.* See [citation omitted] ("*proof that a RICO defendant has been involved in multiple*

> ***criminal schemes would certainly be highly relevant to the inquiry into the continuity of the defendant's racketeering activity***")." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 1204.

See also ***Phelps v. Wichita Eagle-Beacon,*** 886 F.2d 1262 (10th Cir. 1989); and, ***Menasco v. Wasserman,*** 886 F.2d 6891 (4th Cir. 1989).

In the case *sub judice,* plaintiffs have failed to prove anything more than related racketeering acts occurring at the rate of ***less than one per year.*** Parenthetically, plaintiffs were *only* able to show that defendant engaged in isolated and sporadic criminal acts related to the Westside bond offer. Consequently, plaintiffs were unable to establish the "continuity" requirement for a "pattern of racketeering activity", which requirement was described by the Supreme Court in ***H.J., Inc.,*** supra, as racketeering activities that "amount to or threaten long-term criminal activity." Plaintiffs' failure to prove "continuity" was memorialized by the Court of Appeals in ***Abell,*** supra, when it found that "plaintiffs have alleged over half a dozen acts of mail fraud and wire fraud, each of which stems from Westside's bond offer."

For these reasons, this Court should find that **18 U.S.C. §§ 1961, et. seq.,** does not reach the isolated and sporadic criminal acts shown by plaintiffs in this case, and it should dismiss plaintiffs' civil RICO claims asserted against defendant under those statutes.

(C). THE ATTORNEY'S FEES AWARDED TO PLAINTIFFS SHOULD BE SUBSTANTIALLY REDUCED OR ELIMINATED ALTOGETHER

Defendant contends that this Court should substantially reduce or eliminate altogether its award of attorney's fees to plaintiffs. Defendant's contention is based on the decision of the United States Court of Appeals for the Fifth Circuit in ***Abell,*** supra, wherein it held:

> "Nonetheless, we cannot simply affirm the district court's award, for that court awarded attorneys' fees against all of the defendants who stood trial. Thus, the court awarded attorneys' fees for all of the legal work necessary to develop and try plaintiffs' case. ***Plaintiffs developed much of their case, however, to obtain a verdict against WLJ. Several of plaintiffs' legal theories and arguments applied only to WLJ; indeed, at least one of their claims (for legal malpractice) implicates only WLJ.*** Consequently, ***the district court must readjust the attorneys' fees award to compensate plaintiffs only for the legal resources which they expended to develop a case against Fryar and All American.*** For this purpose, we will remand." (Emphasis added). (COPR. (C) WEST 1990 NO CLAIM TO ORIG. U.S. GOVT. WORKS).
>
> Id. p. 1142.

Thus, the Court of Appeals itself envisioned a substantial reduction in the attorney's fees this Court awarded to plaintiffs. As noted by the Court of Appeals, plaintiffs developed much of their case to obtain a verdict against defendant **Wright, Lindsey & Jennings,** and this Court awarded plaintiffs attorney's fees for that legal work. However, this Court's award of attorney's fees

must now be reduced to reflect only the legal resources expended by plaintiffs to develop their case against defendant. Of course, if this Court dismisses plaintiffs' civil RICO claims against defendant, it will be required to virtually eliminate the award of attorney's fees made to plaintiffs.

For these reasons, this Court should substantially reduce or eliminate altogether the attorney's fees awards made to plaintiffs.

(III). CONCLUSION

Defendant has shown that **18 U.S.C. §§ 1961, et. seq.,** is void-for-vagueness. This is so because **18 U.S.C. §§ 1961, et. seq.,** forbids "the doing of [acts] in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." Stated another way, **18 U.S.C. §§ 1961, et. seq.,** exacts "obedience to a rule or standard so vague and indefinite as really to be no standard to all." Alternatively, defendant has shown that plaintiffs failed to prove the "continuity" requirement necessary for the existence of a "pattern of racketeering activity." This is because plaintiffs were *only* able to show that defendant engaged in isolated and sporadic criminal acts related to the Westside bond offer. Finally, defendant has shown that this Court's award of attorney's fees to plaintiffs must be substantially reduced or eliminated altogether. Clearly, such a course of action is mandated by the specific findings of the United States Court of Appeals for the Fifth Circuit in *Abell,* supra.

FOR THE FOREGOING REASONS, this Court should dismiss the civil the civil [sic] RICO claims asserted against defendant Joe E. Fryar by the plaintiff-class of bondholders in Westside Rehabilitation Center.

FURTHER, this Court should substantially reduce or eliminate altogether the attorney's fees awarded to plaintiffs.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this memorandum in support of defendant's motion to dismiss civil RICO claims and in opposition to plaintiffs' motion for order upholding jury verdict, readjusting attorneys' fee award, and recalculating individual plaintiffs' damage award has this date been supplied to opposing counsel of

record by United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 7th day of May, 1990.

/s/ J. Minos Simon
J. MINOS SIMON

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DOCKET NUMBER: 90-4737

EDWARD C. ABELL, JR., and
CAREY WALTON, ET AL
Plaintiffs-Appellees and
Cross-Appellants

VERSUS

POTOMAC INSURANCE COMPANY, ET AL
Defendants

Joe E. Fryar, Wright, Lindsey and Jennings, and
Valley Forge Insurance Company
Defendants-Appellants and
Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, HONORABLE JOHN M. SHAW, UNITED STATES DISTRICT JUDGE PRESIDING

PETITION OF JOE E. FRYAR, DEFENDANT-APPELLANT, FOR REHEARING

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By: J. MINOS SIMON

ATTORNEY FOR
DEFENDANT-
APPELLANT JOE E. FRYAR

TO THE HONORABLE, THE UNITED STATES COURT OF APPEAL, FIFTH CIRCUIT:

Petitioner, Joe E. Fryar, defendant-appellant in the captioned cause, respectfully petitions the Court to grant a rehearing as to the decision of the Court of November 13, 1991, in support whereof petitioner respectfully gives the Court to understand the following:

1.

The November 13, 1991 decision works a violation of your petitioner's constitutional rights in that:

A. It denies to petitioner his due process rights under the Fifth Amendment to the United States Constitution, and

B. It denies to petitioner his right to trial by jury in violation of the Seventh Amendment to the United States Constitution.

A. IT DENIES TO PETITIONER HIS DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

On July 5, 1984 a class action was filed on behalf of the bondholders of Westside Habilitation, Inc. setting forth, among others, a claim against petitioner pursuant to the provisions of 18 U.S.C., § 1961, et seq., (a RICO civil claim).

Trial on the merits to a jury commenced on December 8, 1986 and concluded in February, 1987.

On October 30, 1985, which date subsumes all material time periods involved in the RICO civil claims against Joe E. Fryar, this Court decided the case of *R.A.G.S. Couture, Inc. v. Hyatt,* 774 F.2d 1350. In that decision this Court expressly held that two (2) related acts of mail fraud constituted a "pattern of racketeering activity", without more, within the meaning of the RICO statute. Thus as of October 30, 1985, continuously through the trial date of the RICO civil claims filed against petitioner, the rule of law applicable to the RICO claims against petitioner was that a "pattern of racketeering activity" consisted of two (2) or more related predicate acts, without more. The RICO civil claims against petitioner were to be tested and actually were in fact tested according to the rule of law established by *R.A.G.S., supra.* On appeal from an adverse judgment concerning the RICO civil claims, petitioner challenged the correctness of the *R.A.G.S.* decision. But this Court affirmed *R.A.G.S. Abell v. Potomac Insurance Company,* 858 F.2d 1104 (5th Cir. 1988).

On June 26, 1989 the Supreme Court decided the case of *H.J., Inc., et al v. Northwestern Bell Telephone Company, et al,* 109 S.Ct. 2893. That decision expanded the meaning of "pattern of racketeering activity" far beyond the rule of law established by *R.A.G.S., supra. H.J.* established two (2) essential constituents of the pattern requirement of the RICO statute: (a) relationship or relatedness of two or more predicate acts and (b) continuity or threatening future criminal conduct.

The November 13, 1991 decision of this Court engaged the Court in utilizing the *H.J.* decision, which expanded the "pattern of racketeering activity" rule of

law far beyond the compass of *R.A.G.S.*, as a procrustean bed, upon which the perceived body of evidence developed during petitioner's trial was placed, and its limbs were extended, rather than chopped off, to make that body of evidence fit the procrustean bed. In short the newly expanded meaning of "pattern of racketeering activity" established in 1989 by *H.J.* was retroactively applied to conduct attributed to petitioner originating in 1976, some nine (9) years prior to the 1985 *R.A.G.S.* decision, thus creating a judicial ex post facto rule of law.

At all times material to the RICO civil claims against petitioner, your petitioner had no warning of the *H.J.* conduct which imposed civil and criminal liability upon him; he had no warning of what conduct to avoid or to defend against. He was not informed, for example, that "predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement" (109 S.Ct. at p. 2902). Thus he was not given the opportunity or informed of the right to so tailor his conduct as to fall within the shelter of this defined "pattern of racketeering activity". Nor was petitioner informed that "though the number of related predicates involved may be small and they may occur close together in time, the racketeering acts themselves *include* a *specific threat of repetition* extending *indefinitely* into the future, and thus supply the requisite threat of continuity" (109 S.Ct. at p. 2902). Had he been informed of the multi-factors involved in the *H.J.* definition of "pattern of racketeering activity", then during his trial he would have had the opportunity to present evidence to rebut any incriminatory evidence and particularly the conclusion that "the racketeering acts themselves include a specific

threat of repetition extending indefinitely into the future". Moreover, generally speaking, had petitioner been placed on notice of the conduct proscribed by *H.J.*, he could have avoided the prohibited conduct, and during trial, he could have presented evidence in defense of the claims asserted against him and thus could have had the opportunity to exonerate himself completely from liability.

Petitioner's right to "fair warning" of the nature and character of the conduct proscribed "is fundamental to our concept of constitutional liberty. (citations omitted) As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment". *Marks v. United States*, 97 S.Ct. 990 (1977). See also *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964). Thus the November 13, 1991 decision of this Court complained of herein operates to deny to petitioner his due process rights in violation of the Fifth Amendment.

B. IT DENIES TO PETITIONER HIS RIGHT TO TRIAL BY JURY IN VIOLATION OF THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Pertinent to this assignment of error is the following excerpt of this Court from its November 13, 1991 decision:

> "Along with these relatedness and continuity requirements, the Court introduced tests to establish their presence. See *Kehr Packages, Inc., v. Fidelcor, Inc.*, 926 F.2d 1406, 1412-13 (3rd Cir. 1991). For relatedness, the Court adopted a broad multi-factor test that turns on whether the

> alleged predicate acts 'are interrelated by distinguishing characteristics and are not isolated events.' *H.J.* 492 U.S. at 240, 109 S.Ct. at 2901 (quotation omitted). As for continuity, the Court noted that proof of multiple schemes is 'highly relevant' to the question of continuity but not a prerequisite[12], and defined continuity as 'referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.' *Id.* at 241, 109 S.Ct. at 2902. As was recognized by the Court, these tests are highly fact- and case- specific. See *id.* at 237, 242, 109 S.Ct. at 2899, 2902; *Kehr Packages,* 926 F.2d at 1412-13."

(page 748 of the opinion)

Paraphrasing this Court's foregoing statement, if indeed "these tests are highly fact- and case-specific", then, in petitioner's case, they are to be decided by the jury impaneled to try the case against your petitioner. The fact question of whether the predicate acts attributable to petitioner "are interrelated by distinguishing characteristics and are not isolated events" was never presented to the jury involved in the trial of petitioner's case. Thus none of the multiple factors involved in the issues of relatedness of the predicate acts and the continuity requirements of the RICO statute was ever presented to the jury called upon to try petitioner's case. Petitioner's case indeed was a suit at common law, and the value in controversy exceeded Twenty and No/100 ($20.00) Dollars. As to such a suit the Seventh Amendment provides:

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[12] See *id.* 492 U.S. at 240, 109 S.Ct. at 2901.

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Overriding and essential fact questions involved in the RICO claims against your petitioner and relied upon by this Court for its November 13, 1991 decision were never presented to the jury impaneled to try petitioner's case. The jury in petitioner's case was never called upon to render a verdict as to the relatedness of the alleged predicate acts and as to the continuity factual characteristics of these alleged predicate acts. The November 13, 1991 decision complained of herein instances the act of this Court usurping the prerogative of the jury in determining these facts. In so doing this Honorable Court has denied to your Petitioner trial by jury in violation of the Seventh Amendment to the United States Constitution.

Thus, the November 13, 1991 decision works a violation of your petitioner's constitutional rights in that (a) it denies to petitioner his due process rights under the Fifth Amendment to the United States Constitution, and (b) it denies to petitioner his right to trial by jury in violation of the Seventh Amendment to the United States Constitution.

WHEREFORE petitioner respectfully prays that his petition for rehearing be granted and on rehearing that the November 13, 1991 decision be recalled and the decision of the district court be reversed as originally prayed

for by petitioner in his appeal from the district court decision.

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By: /s/ J. Minos Simon
J. MINOS SIMON
Bar Roll No. 12278

CERTIFICATE

I HEREBY CERTIFY that a copy of the foregoing rehearing application has been forwarded to all counsel of record by United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 22nd day of November, 1991.

/s/ J.Minos Simon
J. MINOS SIMON

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

EDWARD C. ABELL, JR., and
CAREY WALTON, ET AL

VERSUS

DOCKET NUMBER: 87-4260

POTOMAC INSURANCE COMPANY, ET AL

****

MOTION TO RECALL ORDER

COMES NOW, through undersigned counsel, defendant-appellant **Joe E. Fryar** (movant), who respectfully moves this Honorable Court to recall its order of September 12, 1989, remanding this cause to the district court, in support whereof movant gives this Court to understand the following:

OPERATIVE SALIENT FACTS

1. On February 19, 1987, the district court, in accordance with a jury's verdict, entered judgment in the amount of **Twelve Million Ninety-Six Thousand Eight Hundred Sixty-Six and 80/100 ($12,096,866.80) Dollars** in favor of plaintiffs-appellees **Edward C. Abell, Jr.,** and **Carey Walton, et al,** (respondents) and against movant and others in that certain civil action entitled ***"Edward C. Abell, Jr., et al v. Potomac Insurance Company of Illinois, et al"***, Docket Number 84-1786 "O", United States District Court for the Western District of Louisiana, Lafayette-Opelousas Division.

2. The district court's judgment in favor of respondents and against movant was affirmed in part, reversed in part, and remanded by this Court in ***Abell, et al v. Potomac Insurance Company, et al,*** 858 F.2d 1104 (5th Cir. 1988), rehearing en banc denied 863 F.2d 882 (5th Cir. 1988), to the district court for a redetermination of the attorneys' fees and damages awards made against movant.

3. Subsequently, in ***Fryar v. Abell, et al,*** ___ U.S. ___, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989), a petition for writ of certiorari filed by movant was granted by the Supreme Court, summarily vacating that portion of this Court's judgment which had affirmed the district court's judgment holding movant liable to respondents on the civil RICO claims asserted against him. The Supreme Court's order vacating this Court's judgment specifically provided that **"the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *H.J. Inc. v. Northwestern Bell Telephone Company,* 492 U.S. ___, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)."**

4. On July 3, 1989, in ***Edward C. Abell, Jr., et al v. Wright, Lindsey & Jennings, et al,*** ___ U.S. ___, 109 S.Ct. 3242, ___ L.Ed.2d ___ (1989), the Supreme Court denied respondents' petition for writ of certiorari, imparting finality to this Court's judgment that had reversed the district court's nearly **Ten Million and No/100 ($10,000,000.00) Dollars** judgment against movant on respondents' securities law claims.

5. In ***Abell, et al v. Potomac Insurance Company, et al,*** 884 F.2d 196 (5th Cir. 1989), this Court entered an

order, remanding respondents' case against movant to the district court for further consideration in light of *H.J. Inc.*, supra. Additionally, this Court directed the district court to consider the appropriate disposition of this matter in light of movant's pending bankruptcy proceeding, i.e., ***"In Re Joe E. Fryar, Debtor"***, Docket Number 89-BK-80,595, United States Bankruptcy Court for the Western District of Louisiana, Alexandria Division.

6. On January 3, 1990, an order was entered by Hon. **Henley A. Hunter** in the aforementioned bankruptcy proceeding, lifting the automatic bankruptcy stay for the purpose of completing the litigation between movant and respondents. Thus, there is no longer any basis for any concerns this Court might have had regarding the automatic stay imposed by law upon the filing of movant's bankruptcy petition and the effect thereof on its ability to proceed to a determination of this matter.

7. In light of the foregoing, and for the additional reasons hereinafter recited, the remand of this case to the district court is without substantive legal basis and practical support. Additionally, this remand, if continued, will work to impose undue burden on the district court, which is already overextended by virtue of an existing vacant judgeship, and unnecessary and oppressive expense on the parties.

8. The Supreme Court's directive clearly contemplated that the legality of respondents' civil RICO claims against movant should be decided by this Court ***based on the record on appeal***. The resolution of that legal question by this Court will impart finality thereto, except as the

Supreme Court may decide to review such a decision on application for a writ of certiorari.

9. To have the district court, instead of this Court, decide the legality of respondents' civil RICO claims against movant but invites a circuity of judicial proceedings in that such a decision would be appealable to this Court. On appeal, this Court would be called upon to decide the very legal question which the Supreme Court has already directed it to determine. Consequently, this circuitous judicial misadventure would exact a heavy toll on the interests of judicial economy and efficiency and an oppressive financial burden on the parties.

10. For all these reasons, this Court's recall of its order of September 12, 1989, is in the interests of judicial efficiency and economy, as well as the parties' interests in attaining an expeditious and economical resolution of this controversy. This recall will allow this Court to reconsider this matter based on the record on appeal, resulting in substantial savings of judicial time to the district court and of litigation expenses to the parties.

WHEREFORE, MOVANT RESPECTFULLY PRAYS that this Court recall, vacate and set aside its order of September 12, 1989, remanding this case to the district court.

Respectfully submitted:

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By: /s/ J. Minos Simon
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this motion to recall order has this date been supplied to opposing counsel of record by United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this 22nd day of March, 1990.

/s/ J. Minos Simon
J. MINOS SIMON

Supreme Court, U.S.
FILED
APR 23 1992
OFFICE OF THE CLERK

(4)

NO. 91-1470

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOE E. FRYAR,

PETITIONER

VERSUS

EDWARD C. ABELL, JR.,
AND CAREY WALTON, ET AL,

RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF JOE E. FRYAR TO THE BRIEF FILED ON BEHALF OF RESPONDENTS

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EDITOR'S NOTE

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NO. 91-1470

In The

Supreme Court of the United States

October Term, 1991

JOE E. FRYAR,
Petitioner

versus

EDWARD C. ABELL, JR.,
and CAREY WALTON, ET AL,
Respondents

TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner respectfully submits this short point-by-point response to the brief filed on behalf of respondents in this matter.

POINT 1:

At page 17, arguing against the timeliness of petitioner's constitutional attack on the RICO statute, respondents

rhetorically assert "six years after commencement of this case, four years after a nine-week jury trial resulting in a jury verdict in favor of the plaintiff, and two and one-half years after the Fifth Circuit affirmed the jury's RICO verdict, Fryar asserted for the first time on remand a constitutional attack on the RICO statute."

But Fryar's trial commenced in December, 1986 and terminated in February, 1987. The conduct involved in that trial commenced in August of 1978 up to the year 1984. The rule of law by which petitioner Fryar's conduct was adjudicated as to the legal issue of "pattern of racketeering activity" contemplated by **18 U.S.C. § 1961(5)** was that as announced and held by the Fifth Circuit in **R.A.G.S. Couture, Inc. v. Hyatt**, 774 F.2d 1350 (5th Cir. 1985). That rule of law, as exemplified by

R.A.G.S., supra, was that two (2) related acts of mail fraud constituted a "pattern of racketeering activity" without more. Thus, the "pattern of racketeering activity" provision of **18 U.S.C. § 1961(5)**, as interpreted and applied by the Fifth Circuit in **R.A.G.S.**, supra, was not vague and therefore not subject to a constitutional attack for vagueness by petitioner Fryar. Petitioner Fryar's effort to reverse that rule of law after verdict against him was rendered proved futile. **Abell, et al v. Potomac Insurance Company, et al**, 858 F.2d 1104 (5th Cir. 1989) Petitioner Fryar in his petition for certiorari to this Court sought reversal of that rule of law. His application was granted. **Abell, et al v. Potomac Insurance Company, et al**, 109 S. Ct. 3236. That decision was incidental to the Supreme Court's decision in **H.J., Inc. v. Northwestern Bell Telephone**

Company, 492 U.S. 229, 109 S.Ct. 2893 (1989). **H.J.** held that "relatedness" and "continuity" were indispensable components of the "pattern of racketeering activity" contemplated by **18 U.S.C. § 1961(5)**. Petitioner Fryar's case was "remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of **H.J., Inc. v. Northwestern Bell Telephone Company**, supra.

This was the first time that the meaning of "pattern of racketeering activity" as exemplified by **H.J.** was sought to be applied against petitioner Fryar. The Fifth Circuit remanded the **Abell** case to the district court. On that remand, petitioner Fryar then, at the first opportunity available, assailed the constitutionality of the RICO statute as being constitutionally vague as to the meaning of "pattern of racketeering

activity" as held by the Supreme Court in **H.J.** This was the first time that such a rule of law was sought to be applied against petitioner Fryar. Under these peculiar circumstances, his constitutional plea was timely. **Hormel v. Helmarine**, 312 U.S. 552, 61 S.Ct. 719 (1941); **Singleton v. Wulff**, 428 U.S. 106, 96 S.Ct. 2868 (1976).

From an adverse decision rendered by the district court, petitioner appealed to the Fifth Circuit. The Fifth Circuit affirmed holding that the RICO statute was not void for vagueness. **Abell v. Potomac Insurance Company of Illinois**, 946 F.2d 1160 (1991). On rehearing, petitioner Fryar entered a plea asserting that the post-trial application of the "relatedness" and "continuity" elements of RICO's pattern requirement as exemplified by **H.J.** to petitioner's conduct occurring from 1978 to 1984

constituted an impermissible retroactive application of a substantive change in the law, thereby denying to petitioner his right to due process. Petitioner further complained in that rehearing application that he was denied the right to present evidence and argument to the jury on the issues of "relatedness" and "continuity" which resulted in a denial to petitioner of his right to trial by jury. Thus, all constitutional issues presented to the Court in petitioner Fryar's writ application were timely raised and are properly before the Court for adjudication.

POINT 2:

Respondents at page 17 in their brief essentially argue that because the Court's below made a finding of fact as to petitioner Fryar's alleged "fraudulent conduct", such a finding, being correct,

"should not be reviewed". This but emphasizes petitioner Fryar's claim that he was denied trial by jury as to all of the contending material facts involved in the claims made against him and thus was deprived of his Seventh Amendment right to trial by jury.

POINT 3:

Respondents argue (brief pp. 24-25) that "if Fryar's argument is correct, then the law in effect at the time as enunciated in **R.A.G.S.** must apply. Under **R.A.G.S.**, Fryar's conduct clearly was violative of RICO, as previously found by the Fifth Circuit. **Abell v. Potomac Insurance Company**, 858 F.2d 1104 (5th Cir. 1988). Further review is not required."

Such a proposition makes logic stand on its head. **R.A.G.S.** was found to be not the law. Yet, respondents argue that

petitioner Fryar's application should be judged by **R.A.G.S.** Reduced to its bare essence respondents are requesting this Court to approve of the taking of petitioner Fryar's property through the application of lawlessness. No notion of justice can be more barbaric.

POINT 4:

In their brief at pp. 9-10, respondents, though without relevance to the issues presented in petitioner Fryar's writ application, attack petitioner Fryar's standing before this Court by stating that he is guilty of attempted bribery of the jury trying respondent's claims against Fryar and was also guilty of money laundering. This is but an undisguised attempt to bias the Court against petitioner Fryar. It is as well an implicit invitation to have the Court on that account strip petitioner

Fryar of his constitutional liberty as punishment in addition to the penalty imposed upon him by the Court having jurisdiction over the criminal prosecution of petitioner Fryar. Such an invitation is the quintessence of constitutional obscenity and legal outrage and should be rejected as such.

CONCLUSION

1. The constitutional issues involved in petitioner Fryar's writ application were timely raised and are properly presented for adjudication by the Court.

2. As applied to petitioner's specific conduct, and on its face, the RICO statute is constitutionally infirm due to its vagueness.

3. To retroactively apply the substantive decision of **H.J.** regarding the meaning of "a pattern of racketeering activity" rendered in 1989, to petitioner Fryar's conduct originating in 1978 constitutes the denial to petitioner Fryar of constitutional due process.

4. To permit the Courts below to make a finding of fact as to petitioner Fryar's conduct vis-a-vis the substantive decision of **H.J.** regarding a "pattern of racketeering activity" denies petitioner Fryar of his Seventh Amendment constitutional right to trial by jury.

It is respectfully submitted that for all of the reasons asserted in his writ application and those contained in

this reply brief, petitioner's application should be granted reversing the decision of the Court of Appeal Fifth Circuit.

Respectfully submitted,

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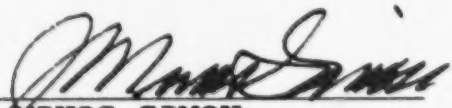
By: 
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